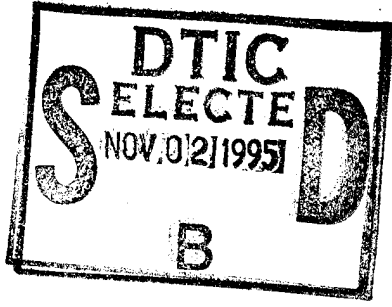


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RCRA/CERCLA Integration at DoD Facilities: The Case for Federal Control

By

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## I. INTRODUCTION

Environmental contamination of thousands of military facilities is a costly legacy of the Cold War for which the nation is paying increasing costs. The Department of Defense (DoD) has spent about \$11 billion on investigating, studying, and cleaning up contamination on military bases since 1984 and recently estimated that finishing the job could cost as much as \$30 billion. In 1995, the Congress authorized the department to spend about \$2.5 billion on environmental cleanup projects. According to current plans, the department expects to request another \$2.6 billion in 1996....To date, the Congress has been able to authorize sufficient funding to meet DoD's requirements. Given the increasing costs of remediation, however, DoD may not be able to meet the requirements of its cleanup program on schedule and within budgetary projections.<sup>1</sup>

In light of these fiscal realities facing DoD's environmental restoration program, decision makers in DoD and the Congress must make the program more cost-effective if the cleanup requirements are to be met. The integration of the Resource Conservation and Recovery Act (RCRA)<sup>2</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>3</sup> in an environmental cleanup action<sup>4</sup> is one aspect of environmental restoration that should be addressed in order to enhance DoD's ability to meet its cleanup requirements. The conflicting statutory provisions of these two statutes have generated much confusion as to which procedural framework to follow.<sup>5</sup> This confusion delays the cleanup process. Challenges to

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<sup>1</sup>CONGRESSIONAL BUDGET OFFICE, CBO PAPERS, CLEANING UP DEFENSE INSTALLATIONS: ISSUES AND OPTIONS (January 1995) at vii [hereinafter CBO, CLEANING UP DEFENSE INSTALLATIONS].

<sup>2</sup>42 U.S.C. §§6901-6992k.

<sup>3</sup>42 U.S.C. §§9601-9675.

<sup>4</sup>Throughout this paper, the terms "cleanup action", "response action", and "remediation" are used interchangeably. All three terms are used to refer to environmental cleanup actions, whether response actions pursuant to CERCLA or corrective action pursuant to RCRA.

<sup>5</sup>See Laurent R. Hourcle, *Subpart K of the National Contingency Plan: The "Missing Link" in the Federal Facilities Cleanup Program*, 4 Federal Facilities Environmental Journal 401, 402 (Winter 1993-94) [hereinafter Hourcle, *Subpart K*]. The proposed rule establishing Subpart K was withdrawn by EPA on April 1, 1994. Unified (continued...)

CERCLA cleanup actions by states pursuant to RCRA corrective action authority delegated by EPA and state "mini-Superfund" laws also create costly delays and litigation.<sup>6</sup> The interagency agreements (IAGs) that constitute the current approach to RCRA/CERCLA integration also delay the cleanup process.<sup>7</sup>

Other factors exacerbate the problems caused by the conflicts between RCRA and CERCLA at federal facilities. First, there is the enormity of the environmental cleanup task at federal facilities. Second, there is the perception of "foot-dragging" by federal agencies in conducting environmental cleanups. Third, state and local governments are obviously interested in swift cleanup actions at closed federal facilities to foster re-use after bases are closed. Depending on the planned future use and the cleanup standards advocated by the state and local

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<sup>5</sup>(...continued)

Agenda, EPA, 59 Fed. Reg. 21,042, 21,155 (1994). The confusion over which statute governs is exacerbated by the complexity of each statute and by the fact that neither statute is a model of clarity. CERCLA has been described as "a complex piece of legislation" [Beazer East, Inc. v. The Mead Corp., 34 F.3d 206, 219 (3d Cir. 1994), *cert. denied*, 1995 U.S. LEXIS 2656 (April 17, 1995)] and as a "statute riddled with inconsistencies and redundancies". U.S. v. Alcan Aluminum Corp., 964 F.2d 252, 258 n.5 (3d Cir.1992), *reh'g, en banc, denied*, 1992 U.S.App. LEXIS 17371 (3rd Cir. July 27, 1992). One court described an examination of RCRA as "mind-numbing". American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

<sup>6</sup>JAMES T. REILLY, MARK A. NORMAN, AND KYLE A. KANE, 1 RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS, §1.01 (Shepard's, 2d Ed. 1994) [hereinafter RCRA AND SUPERFUND PRACTICE GUIDE]. The authors comment that the current "mix-and-match state and federal programs breed wasteful competition", and that "[m]icro-management by Congress, in the form of mandates inserted into RCRA amendments and CERCLA revisions, has forced federal officials to make administrative decisions that work counter to the efficient shared responsibilities of the EPA and the states." *Id.*

<sup>7</sup>It should be noted that IAGs are required by statute, and that Congress imposed such a requirement to expedite, not delay, the cleanup process. 42 U.S.C. §9620(e)(2). However, it may take over one year to negotiate an IAG. GAO, FEDERAL FACILITIES: ISSUES INVOLVED IN CLEANING UP HAZARDOUS WASTE (1992 Hearings before the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, House of Representatives), GAO/T-RCED-92-82 at 4 (Statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division) [hereinafter GAO, FEDERAL FACILITIES ISSUES]. The involvement of multiple federal and state agencies in cleanup decisions causes confusion and delay in federal facility cleanup actions. *Id.*; Richard A. Wegman and Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 Ecology L.Q. 865, 898-902 (1994) (citing Department of Defense, Report of the Defense Environmental Response Task Force 30 -33 (1991)) [hereinafter Wegman, *Cleaning Up Military Wastes*].

governments, this may create some tension between compliance with federal environmental laws and expeditious reuse. Finally, despite the increasing costs of environmental cleanup for federal agencies, Congress has been reducing environmental restoration funding for federal agencies.<sup>8</sup>

This paper examines the integration of RCRA (either the federal program or a state program pursuant to an EPA delegation of authority) and CERCLA in cleanup actions conducted on federal facilities. It will focus on Department of Defense (DoD) facilities. Part II of the paper examines the problem in detail, focusing on the scope of the problem for DoD, the slow pace of cleanup at DoD sites, the unique funding constraints placed on DoD and other federal agencies, and the problems with the current approach to RCRA/CERCLA integration. Part III examines the statutory framework relevant to this issue. In addition to reviewing the applicable provisions in CERCLA and RCRA, the paper also reviews the Federal Facilities Compliance Act of 1992 (FFCA), the Defense Environmental Restoration Program (DERP), and the National Environmental Policy Act (NEPA). Part IV of the paper puts forth an argument for enhanced federal control over environmental cleanup at federal facilities.

This paper concludes that the effectiveness of environmental cleanup at DoD facilities would be improved by recognizing DoD's lead agency status for response actions under CERCLA, and by clarifying the scope of CERCLA and RCRA to eliminate as much overlap as possible. As lead agency, DoD possesses the authority to resolve any conflicts between CERCLA and RCRA, to decide which statute will govern at the site if both apply, and to determine the nature and the pace of the cleanup action. State and local governments should be

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<sup>8</sup>GENERAL ACCOUNTING OFFICE, ENVIRONMENTAL CLEANUP, TOO MANY HIGH PRIORITY SITES IMPEDE DoD'S PROGRAM, GAO/NSIAD-94-133, at 7 (April 1994) [hereinafter GAO HIGH PRIORITY SITES]; Wegman, *Cleaning Up Military Wastes*, *supra* note 7 at 904-905; see discussion *infra* page 13.

afforded the opportunity for meaningful participation in the process, but not control over the process. The overlap between RCRA and CERCLA should be minimized in one of two ways. Congress could enact one statute governing hazardous substance management -- this includes hazardous waste management and response actions. If the current statutory framework is retained, the scope of CERCLA and RCRA should be pulled back consistent with the original purposes of the statutes. RCRA, specifically RCRA corrective action, should cover releases from existing hazardous waste management facilities. CERCLA should apply to all other releases of hazardous substances. Finally, federal rules, not state rules, must apply to cleanup actions on federal facilities. This approach will promote effective environmental cleanups through the consistency, simplicity, and predictability gained by imposing one set of rules under a single federal authority.



## II. The Problem

### A. Scope

Cleanup of hazardous waste sites at military facilities is considered to be DoD's "largest challenge".<sup>9</sup> Cleanup activities are underway at nearly 1800 DoD installations in the U.S. and overseas; over 100 of these sites are on the NPL.<sup>10</sup> Other federal agencies face environmental problems of significant magnitude. Radioactive and other hazardous waste from nuclear weapons production contaminates 137 sites and facilities in 34 states and territories.<sup>11</sup> "The Departments of the Interior and Agriculture may be faced with cleaning up hundreds of

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<sup>9</sup>Wegman, *Cleaning Up Military Wastes*, *supra* note 7 at 868 n.10 (citing DoD Env'tl. Programs: Hearings Before the Readiness Subcomm., the Env'tl. Restoration Panel, and the Dep't of Energy Defense Nuclear Facilities Panel of the House Comm. on Armed Servs., 102d Cong., 1st Sess. 194 (1991)(testimony of Thomas E. Baca, Deputy Assistant Secretary of Defense (Env't)). As the military downsizes and bases are closed, cleanup of contamination on closing facilities is becoming a significant portion of the DoD cleanup effort. For example, on the domestic bases listed in the first two closure rounds, over 500 contaminated sites were identified, and 25 of those bases are on the National Priorities List (NPL). *Id.* The cleanup process at closing facilities is complicated by the addition of a new objective -- conversion to productive reuse as quickly as possible -- that may conflict with the objective of environmental restoration. The level of conflict depends on the cleanup standards imposed at the site. Often the cleanup action is the "most difficult obstacle" to productive reuse. *Id.* at 868 n.7 (quoting GAO, *MILITARY BASES: REUSE PLANS FOR SELECTED BASES CLOSED IN 1988 AND 1991* 18, Pub. No. NSIAD-95-3 (1994)). In 1992, a CBO report stated that only about 3 percent of the potentially contaminated sites on the 1988 closure list had been completely cleaned up. *Id.* at 868 n.8 and n.13.

<sup>10</sup>Steven A. Herman, *Environmental Cleanup and Compliance at Federal Facilities: An EPA Perspective*, 24 Environmental Law 1097, 1099 (July 1994) [hereinafter *EPA Perspective*] (citing 1994 U.S. Dept of Defense Annual Report 2; & Hearings Before the Subcommittee on Military Installations and Facilities of the House Armed Services Comm., 103d Cong., 2d Sess. (Apr. 19, 1994)(statement of Elliot P. Laws, Ass't Administrator, U.S. EPA Office of Solid Waste and Emergency Response). DoD has identified 19,694 potentially contaminated sites on 1,722 DoD installations and 8,004 potential sites on 1,632 formerly used installations. DoD has closed out 9,255 of the sites on current installations and 5,189 of the sites on formerly used installations. GAO HIGH PRIORITY SITES, *supra* note 8 at 4-5 (citing DoD's 1993 Annual Report to Congress). As of March 1994, there are about 13,200 active (those being studied and remediated) DoD sites. Of those active sites, 107 are on or proposed for inclusion on the National Priorities List (NPL). DoD's NPL sites are scattered across 39 states. CBO, *CLEANING UP DEFENSE INSTALLATIONS*, *supra* note 1 at viii. Thus, the vast majority of DoD cleanup sites are not on the NPL.

<sup>11</sup>*EPA Perspective* at 1099 n.5 (citing ENVIRONMENTAL MANAGEMENT 1994: PROGRESS AND PLANS OF THE ENVIRONMENTAL RESTORATION AND WASTE MANAGEMENT PROGRAM 1, U.S. Dept of Energy, Pub.No. DOE/EM-0119 (February 1994).

thousands of abandoned and inactive mines and other sites on public lands.”<sup>12</sup>

For federal agencies, the problem usually surfaces at a facility with a unit or units with a RCRA permit or interim status, and where a part of the facility is subject to, or has an on-going CERCLA remedial investigation.<sup>13</sup> EPA suggests four enforcement options, to be used in combination or separately: a RCRA permit, a RCRA Corrective Action Order, a CERCLA section 106 Imminent and Substantial Endangerment Order, or a CERCLA section 120 Interagency Agreement (IAG).<sup>14</sup> If the facility is on or is likely to be placed on the NPL, EPA recommends the use of an IAG and to include the state.<sup>15</sup>

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<sup>12</sup>*Id.* at 1099 (citing *Majority Staff of Subcomm. on Oversight & Investigations of House Comm. on Natural Resources*, 103d Cong., 1st Sess., *Deep Pockets: Taxpayer Liability for Environmental Contamination* 7 (Comm. Print 1993)).

<sup>13</sup>EPA Memorandum, Enforcement Actions Under RCRA and CERCLA at Federal Facilities, from J. Winston Porter, Assistant Administrator Office of Solid Waste and Emergency Response, to Regional Administrators Regions I-X, January 25, 1988 (reprinted in ROBERT E. STEINBERG AND RICHARD H. MAYS, 4 RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS, Ch. 65 at 65-8 (Shepard's, 2d Ed. 1994) (Vol. 1 cited *supra* note 6)). It should be noted that this memorandum was written before the waiver of sovereign immunity under RCRA pursuant to the Federal Facilities Compliance Act of 1992, discussed *infra* page 60. Thus, at least under RCRA, some of the enforcement problems addressed in the memorandum are no longer significant. While this memorandum is cited here to illustrate the common CERCLA/RCRA overlap situation, it is also relevant to this paper as a harbinger of the “parity” concept currently being considered by EPA. See discussion *infra* page 85. The memorandum noted that RCRA permitted facilities could meet some CERCLA requirements through RCRA corrective action and also encouraged the incorporation of RCRA and CERCLA activities under one comprehensive enforcement agreement. *Id.* at 65-9 & 65-10.

<sup>14</sup>*Id.* As noted *supra* note 7, IAGs are required by CERCLA section 120(e)(2) for all remedial actions conducted by a federal agency.

<sup>15</sup>CERCLA section 120(e)(2) requires an IAG between EPA and the federal agency conducting the cleanup action. The Model IAG for DoD cleanup actions notes that DoD and EPA “agree that it is extremely important that states participate in Federal facility cleanups by joining as a Party to these agreements.” EPA Office of Solid Waste and Emergency Response (OSWER) Directive No. 9992.2 (June 17, 1988). The Model IAG indicates an intention to conduct the cleanup pursuant to CERCLA. The agreement is entitled “Federal Facility Agreement under CERCLA Section 120”. The section of the Model IAG entitled “Purpose” includes the following purposes: (1) to identify Interim Remedial Action (IRA) alternatives pursuant to CERCLA; (2) to establish remedial investigation/feasibility study (RI/FS) requirements pursuant to CERCLA; (3) to identify response actions as required by CERCLA. *Id.* at 6-7. In addition, the section entitled “Statutory Compliance/RCRA-CERCLA Integration” states that the cleanup activities covered by the IAG will comply with CERCLA and satisfy the requirements of RCRA corrective action, and that, with respect to releases of hazardous waste, RCRA is to be considered an applicable or relevant and appropriate requirement (ARAR) pursuant to CERCLA section 121. *Id.* at 8-9. The Model IAG also states that the only permit requirements applicable are those required by CERCLA and the NCP. Finally, the Model IAG states that nothing in

(continued...)

## B. Slow Pace of Cleanups at Federal Facilities

Critics of DoD cleanup efforts often cite the slow pace of cleanup at federal sites. Indeed, as one recent study noted, “[a]s of the end of fiscal year 1993, about 5 percent of all active sites and about 3 percent of the NPL sites had been cleaned up.”<sup>16</sup> Yet not all of the blame can be placed on the recalcitrance of DoD officials. A 1994 GAO study of the DoD environmental cleanup program for high priority installations listed “[d]isagreements with regulatory agencies over the extent of cleanup required” and “[s]carce resources, including limited technology and expertise” as two of six “key factors that have affected DoD’s cleanup of high priority installations in a timely and cost-effective manner.”<sup>17</sup>

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<sup>15</sup>(...continued)

the IAG alters DoD’s authority over removal actions pursuant to CERCLA section 104. Each party designates a project manager for the remedial action, a representative for the Dispute Resolution Committee (DRC), and a representative for the Senior Executive Committee (SEC). *Id.* at 19-23 (section entitled “Resolution of Disputes”). Even though DoD may be the lead agency, any disputes regarding the cleanup action are not resolved by DoD, but by the DRC. A unanimous vote is required to resolve the dispute. If the DRC cannot reach a unanimous decision, the dispute is forwarded to the SEC. If the SEC cannot reach a unanimous decision, the dispute is elevated to the EPA Regional Administrator. *Id.* As discussed *infra* in Part II.E, the problem with this approach is that it provides states the ability to control the pace and perhaps even the nature of cleanup at the federal facility, even if the cleanup is at a CERCLA site. This is inconsistent with the purpose of CERCLA, which was intended to provide the federal government with an expeditious means of cleaning up inactive or abandoned hazardous waste sites and of responding to hazardous substance spills. *See* discussion *infra* page 19. It is also poor policy for two reasons. First, it delays cleanups at federal facilities, making them more expensive. IAG negotiations delay the cleanup process. *Supra* note 7. Adding the state as another party to the IAG will likely lengthen negotiations. Second, including the state as a party whose assent is required in an IAG (and in the first two stages of the dispute resolution process) is not the same as allowing state participation via comments and consultation as called for in CERCLA section 120(f). The former approach gives the states a type of veto power, giving a state a degree of control over the agency’s budget and agenda. Such a pronounced state influence can impair the ability of the federal agency to conduct its primary mission. These policy arguments are discussed below in Part IV.F.

<sup>16</sup>CBO, CLEANING UP DEFENSE INSTALLATIONS, *supra* note 1 at viii.

<sup>17</sup>GAO HIGH PRIORITY SITES, *supra* note 8, at 3-4. The other four key factors identified were: EPA’s system of identifying high priority sites (which has resulted in a large number of individual sites on installations); the “complex and time-consuming CERCLA study and cleanup process”; study rather than cleanup of sites; and CERCLA requirements to address issues such as liability that do not pertain to federal facilities. A 1992 GAO study also cited coordination problems between DoD, EPA, and state agencies as “a significant impediment to prompt remediation...especially when overlapping CERCLA and RCRA compliance is involved. GAO, FEDERAL FACILITIES ISSUES, *supra* note 7 at 2-7. GAO listed the fact that IAGs can take over one year to negotiate, EPA and agency disagreements over technical and funding requirements, and the burdensome review process in which EPA and

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State efforts often hinder cleanup process. EPA has complained that state intervention often results in delays to cleanup actions and that unchecked state authority at CERCLA sites may work to thwart CERCLA goals.<sup>18</sup> Especially in base closure situations, DoD may not be able to comply with federal, state, and local requirements for cleanup. For example, in 1988, Rep. Richard Ray (D-Ga), chairman of the environmental restoration panel of the House Armed Services Committee, testified that "DoD's cleanup program would be 'unmanageable' if bases had to meet state, local, and federal permit requirements during superfund cleanups, as is required for private sector cleanups."<sup>19</sup>

Rep. Ray noted that "Congress, in its debate over CERCLA, specifically determined that states should not have veto authority over cleanup remedies but instead should have a right to

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the states generate comments that the agency must address. *Id.* at 4. Interestingly, none of these factors are solely under DoD control.

<sup>18</sup>Peter M. Manus, *Federalism under Siege at the Rocky Mountain Arsenal: Preemption and CERCLA after United States v. Colorado*, 19 Colum.J.Env'tl.L. 327, 328 (1994) [hereinafter Manus, *Federalism under Siege*]. The Supreme Court noted a similar concern in *Exxon Corp v. Hunt* when it noted the Congress' concern with the economic disadvantages of imposing a multitude of state regulations on industry. 475 U.S. 355, 372 n.15 (1986)(citing H. R. Rep. No. 96-172, p. 22 (1979) (accompanying H. R. 85)). The problems and disadvantages presented by duplicative or overlapping state requirements were also discussed in Justice Powell's dissent in *California Coastal Comm'n. v. Granite Rock Co.*, 480 U.S. 572 (1987) (Powell, J., concurring in part and dissenting in part). Justice Powell argued that allowing a state to impose its own permit requirements on the use of federal lands necessarily conflicts with the federal permit system that "reflects a careful balance between two important federal interests". *Id.* at 605. In other words, overlapping or duplicative state authority creates a potential for conflict because the state can "strike a different balance" than the balance reached by the federal government. *Id.* Furthermore, Justice Powell noted that federal land management statutes and regulations already provide affected states with the opportunity to voice their concerns to federal regulators. Thus, a duplicative system of state permits serves no purpose. *Id.* at 605-606. Justice Powell concluded that "duplicative federal and state permit requirements create an intolerable conflict in decision making. [footnote omitted] In view of the Property Clause of the Constitution, as well as common sense, federal authority must control with respect to land 'belonging to the United States.'" *Id.* at 606. Similar concerns support the argument against state authority over CERCLA cleanup actions at DoD facilities.

<sup>19</sup>*Multiple Permit Requirements 'Unmanageable' for DoD, House Armed Services Panel Head Says*, 19 Environment Reporter (BNA) 1110 (Sept. 30, 1988). Rep. Ray also argued that CERCLA, rather than RCRA, should be used to clean up federal facilities; that a model agreement reached between DoD and EPA be used to guide interagency superfund cleanups agreements; and that DoD cleanups should not be totally funded by the federal government.

‘participate’ in the process of developing a remedy.”<sup>20</sup> State control of DoD cleanup actions, argued Rep. Ray, should be avoided for three reasons. First, “allowing states to control cleanups would circumvent the priority ranking process in CERCLA that was needed because only limited DoD funds were available for cleanups.” Second, “‘no one would be in control [of cleanups] since everyone would be in control’ if DoD had to meet all local, state, and federal permit requirements.” Third, “if federal funds were used exclusively for CERCLA cleanups, states would have no stake in holding down costs.”<sup>21</sup>

Delays and uncertainty also result from confusion over which regulatory framework applies, especially at sites not on the NPL. As long as the site is not on the NPL, it must also contend with state attempts to enforce its own requirements.<sup>22</sup> However, there is always a risk that the site may be listed. If a site is subsequently listed, any remedial work done must be consistent with the NCP. If the remedial work is done consistent with the NCP, it may not satisfy state requirements. If the work is done according to state requirements and the site is later listed on the NPL, any work not consistent with the NCP may have to be reaccomplished.<sup>23</sup>

### C. Federal Agencies -- Resisting Compliance with Environmental Regulations?

Another factor to be considered is the perceived reluctance of federal agencies to comply with environmental regulations. Indeed, this factor was a key impetus in the drive to pass the

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<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>CERCLA section 120(a)(4), 42 U.S.C. §9620(a)(4).

<sup>23</sup>Hourcle, *Subpart K*, *supra* note 5 at 403-404.

Federal Facilities Compliance Act of 1992.<sup>24</sup> This perception, however, is changing. Last summer, the new EPA Assistant Administrator for Enforcement and Compliance Assurance noted that he was "encouraged by the attention federal agencies like the Department of Defense are now giving to environmental issues."<sup>25</sup>

It must be noted that DoD has not been ignoring environmental issues. For the past 20 years DoD has been identifying and studying the characteristics of its contaminated sites. The initial investigatory phase has been completed at most sites.<sup>26</sup> Current efforts are focused on characterizing the sites and developing technical plans and cleanup schedules.<sup>27</sup> The completion rate for DoD sites also appears to be accelerating. Cleanup actions on 44 sites were completed during 1991-92. Cleanup actions at 155 sites were completed in 1993.<sup>28</sup>

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<sup>24</sup>106 Stat 1505, Pub.L. No. 102-386 (1992) [hereinafter FFCA]. The FFCA is discussed *infra* page 60. Frustration with the success of federal agencies in avoiding state environmental regulation was also a significant factor. See Stephen J. Darmody, *Hazardous Waste Law for the Federal Employee after the Federal Facility Compliance Act of 1992*, 40 Fed.B.News & J. 650, 652 (Nov./Dec. 1993) [hereinafter Darmody, *Hazardous Waste Law*] (State frustration with the ability of federal agencies to avoid state regulation was fueled by a perception that EPA was "strictly enforcing federal requirements against state agencies, while allowing federal agencies to be the worst environmental offenders" and by court decisions narrowly interpreting waivers of sovereign immunity in federal environmental statutes.); Stan Millan, *Federal Facilities and Environmental Compliance: Toward a Solution*, 36 Loy.L.Rev. 319 (Summer 1990) [hereinafter Millan, *Federal Environmental Compliance*] (Dr. Millan argues in his Introduction that federal agencies have "not responded to environmental laws in tandem with industry and municipalities.").

<sup>25</sup> *EPA Perspective*, *supra* note 10, at 1098.

<sup>26</sup>The number of sites involved in DoD's environmental restoration program must be kept in mind when evaluating the program. As noted *supra* note 10, as of March 1994, there are about 13,200 active (those being studied and remediated) DoD sites.

<sup>27</sup>CBO, CLEANING UP DEFENSE INSTALLATIONS, *supra* note 1 at 12-14. The CBO study notes that more than 1000 interim cleanup measures to minimize environmental threats to health and safety have been completed. However, "relatively few permanent cleanup actions" have been completed. *Id.*

<sup>28</sup>*Id.* at 14.

#### D. Funding Constraints

DoD environmental programs operate under unique fiscal constraints and pressures. Estimates of cleanup costs for DoD sites historically have been understated and inaccurate.<sup>29</sup> Since fiscal year 1993, Congress has reduced appropriations for DoD environmental programs.<sup>30</sup> Federal agencies operate under fiscal law and are limited to spending money only for items in the appropriations funding from Congress.<sup>31</sup> The federal government's budget process can affect cleanup costs. These factors not only distinguish DoD cleanup actions -- and all cleanup actions on federal facilities -- from cleanups conducted by non-governmental entities, but these factors also complicate DoD cleanup actions.

Through fiscal year 1993, DoD spent \$8.1 billion to study, investigate, and cleanup sites at all DoD installations.<sup>32</sup> In 1991, DoD had estimated that it would cost \$24.5 billion to study and cleanup the 19,694 potential sites on current installations.<sup>33</sup> In June 1993, DoD officials

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<sup>29</sup>See discussion *infra* note 35 and accompanying text.

<sup>30</sup>See discussion *infra* at page 13.

<sup>31</sup>Appropriations Act, 31 U.S.C. §1301(a) (1994) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); Anti-Deficiency Act (ADA), 31 U.S.C. §1341. The ADA prohibits a federal officer or employee from authorizing an expenditure or obligating the government in excess of the amount appropriated for that particular expenditure or obligation. It also prohibits an officer or employee from obligating the government for the payment of money before an appropriation is made, unless such an obligation is authorized by law.

<sup>32</sup>GAO HIGH PRIORITY SITES, *supra* note 8 at 6.

<sup>33</sup>*Id.* DoD also faces the problem of environmental cleanup at overseas installations. Current estimates of the cost of environmental restoration projects at overseas installations may also be too low. Wegman, *Cleaning Up Military Wastes*, *supra* note 7 at 878. In addition to the normal complexities of the technical aspects of environment restoration, overseas cleanup actions must navigate through foreign environmental laws and status of forces agreements (SOFAs). Complicating matters further, DoD plans to close or realign almost 40 percent of its overseas facilities by the end of fiscal year 1996. *Id.* at 878, 923-24, 928-35. U.S. environmental laws are not applicable at overseas installations because of the general presumption against the extraterritorial application of statutes. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 530 (D.C. Cir.1993). However, federal agencies are required to prepare environmental analyses for major federal actions significantly affecting the environment of the global commons or of a foreign nation. Executive Order No. 12,114, 44 Fed. Reg. 1957 (1979).

stated that the estimated cost had risen to about \$30 billion.<sup>34</sup> DoD cautions that, until the extent of contamination is known at all sites, cleanup costs may vary “dramatically, depending upon the cleanup goals and alternatives selected.”<sup>35</sup> If state standards are imposed at a site, as at the Rocky Mountain Arsenal, the cleanup cost could increase significantly.<sup>36</sup> Finally, cleanup actions at closed military bases can be expected to further increase environmental restoration costs for DoD.<sup>37</sup>

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<sup>34</sup>GAO HIGH PRIORITY SITES, *supra* note 8 at 6; see Wegman, *Cleaning Up Military Wastes*, *supra* note 7 at 875-879, 903 (noting that the \$30 billion estimate is 200-400 percent above the 1985 estimate of \$5-10 billion. In a 1992 hearing, Rep. Robin Tallon suggested that the actual cost of environmental cleanup at military facilities could run as high as \$100-200 billion. *Id.* at n.221 (citing Hearings on the National Defense Authorization Act for Fiscal Year 1993, H.R. 5006, Before the House Comm. on Armed Servs., 102d Cong., 2d Sess. 484 (1992)).

<sup>35</sup>GAO HIGH PRIORITY SITES, *supra* note 8 at 6-8. See CBO, CLEANING UP DEFENSE INSTALLATIONS, *supra* note 1 at Chapter III. The CBO study notes that DoD spending for environmental cleanup has risen an average of 23 percent each year since 1984. In comparison, DoD spending on procurement, and on research and development has decreased by about 7 percent each year. *Id.* at 17. Even though current estimates of the cost of cleanup may be more reliable than those made before 1989, the following factors indicate that costs may climb even higher and that cost estimates will continue to be uncertain: incomplete knowledge of the size and scope of remaining cleanup options, longer than anticipated cleanup time, stricter cleanup standards, and poor initial estimates. *Id.* at 18-22. Also, cleanup costs may rise if cleanup is delayed “without corresponding development of cost-saving technologies.” GAO, FEDERAL FACILITIES ISSUES, *supra* note 7 at 5.

<sup>36</sup>GAO HIGH PRIORITY SITES, *supra* note 8 at 24.

<sup>37</sup>It should be noted that funding for environmental restoration related to base closure is from the Base Realignment and Closure (BRAC) budget, not from DERA. GAO, MILITARY BASES: ENVIRONMENTAL IMPACT AT CLOSING INSTALLATIONS 16, GAO/NSIAD-95-70 (February 1995) [hereinafter GAO, CLOSING INSTALLATIONS]. According to the GAO report, the estimated cost in the fiscal year 1995 budget for the 1988 and 1991 closure rounds was about \$2.2 billion, an increase of about \$400 million over the fiscal year 1993 estimate. *Id.* For a comprehensive discussion of this complicated problem, see Wegman, *Cleaning Up Military Wastes*, *supra* note 7. For instance, environmental cleanup cost estimates for closing military bases must not only consider the “normal” variables of type and extent of contamination, but must also consider pressure from state and local governments eager to convert the facility for productive reuse. According to a recent GAO report, DoD does not consider environmental restoration costs in base closure decisions since contamination on bases must be cleaned up regardless of closure. However, after closure, environmental restoration costs can represent a “significant cost following a base closure... since pressure for rapid conversion and reutilization of closed bases will not allow the costs to be spread over many years.” *Military Base Closing Decisions Lack Consideration of Cleanup Costs, GAO Says*, Daily Environment Report (BNA) at A-4, April 17, 1995 (citing MILITARY BASES: ANALYSIS OF DOD'S 1995 PROCESS AND RECOMMENDATIONS FOR CLOSURE AND REALIGNMENT, GAO Report NSIAD-95-133 (released April 14, 1995)). Cleanup costs are estimated at about \$2 billion for the 33 major bases and about \$147.3 million for the minor bases proposed for closure in the 1995 round. However, GAO warned that these estimates are “only preliminary” because the environmental surveys for the targeted bases were not done to reflect shorter time periods to expedite property transfer; CERCLA cleanup studies have not been done; types and amounts of contaminants are not known; cleanup requirements are subject to change; and (continued...)



Despite these increasing costs, Congress has reduced DoD's budget requests for the environmental restoration program since fiscal year 1993. Congress appropriated \$1.2 billion in 1993, reducing DoD's request by \$313 million; in 1994 Congress appropriated \$2 billion, reducing DoD's request by \$347 million.<sup>38</sup> While DoD requested about \$2.68 billion for fiscal year 1995 environmental restoration,<sup>39</sup> Congress appropriated only about \$2.5 billion.<sup>40</sup> This Congress seems especially skeptical of DoD environmental budget requests.<sup>41</sup> For FY 1996, the House of Representatives has proposed a reduction of \$742 million to the DoD environmental budget.<sup>42</sup>

<sup>38</sup>GAO HIGH PRIORITY SITES, *supra* note 8 at 7.

<sup>40</sup>*DOD Environment Program has Failed to Justify Spending, House Panels Say*, 25 *Environment Reporter* 2392 (BNA), March 31, 1995.

<sup>42</sup>Such reductions are predicted to delay cleanup efforts. *DOD Official Tells House Panel that Cuts Would Slow Base Reuse Cleanup*, Daily Environment Report (BNA), LEXIS 1995 DEN 60 d6, March 29, 1995 (testimony of Sherri W. Goodman, deputy under secretary of defense for environmental security, before the House Appropriations Subcommittee on Military Construction). When asked about "the impact of a 10 percent reduction in funds" to DoD's facilities cleanup program, Goodman responded that DoD "would do less in its [environmental] work overall. It would slow down our ability to set up bases for reuse . . . there would be less job creation, less cleanup, and less benefits."

(continued...)

The Appropriations Act and the Anti-Deficiency Act restrict spending by federal agencies by requiring agencies to spend or obligate funds only as specified in Congressional appropriations.<sup>43</sup> This can build delays into the process when the agency must request a funding authorization and appropriation from Congress in order to initiate a cleanup action. Even if a federal agency is required to pay a penalty under RCRA, the Anti-Deficiency Act may preclude such a payment. The EPA has recognized that, in such a case, the most the agency is able to do

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*Id.* Other federal agencies predict similar consequences from funding reductions for environmental programs. *Proposed Cuts to DOE Budget Would Affect 50 Sites Nationwide, DOE Says*, Daily Environment Report (BNA), A-4, July 11, 1995. HR 1530, the defense authorization bill, was approved by the House on June 15, 1995. In fiscal year 1994, the federal environmental restoration and compliance budget was over \$11 billion while the DoD environmental budget, as noted, was \$2 billion. In that fiscal year, DoD spending on environmental programs accounted for about 2.2 percent of total defense spending. CBO, *CLEANING UP DEFENSE INSTALLATIONS*, *supra* note 1 at 28, Table 4. The July 11, 1995, BNA article highlighted the proposed \$800 million reduction to the DoE FY 1996 environmental budget and the predicted effect on DoE cleanup efforts. The Energy and Water Appropriations bill (HR 1905), passed by the House on July 12, 1995, reserves about \$ 5.8 billion for DoE's waste management and environmental restoration programs; the DoE budget for FY1996 in HR 1905 is \$14.7 billion. Daily Environment Report (BNA), July 14, 1995. According to the Daily Environment Report article in the July 11, 1995, issue, DoE's original request for its Office of Environmental Management was \$ 6.6 billion. In a letter dated July 10, 1995, Thomas P. Grumbly, DoE's assistant secretary for environmental management, predicted that the proposed reduction would "impede on-ground cleanups and affect funding at 50 DoE sites nationwide." Specifically, Mr Grumbly predicted that the proposed reductions "would prevent upgrades of certain safety systems, cause widespread delays in the cleanup process, impair managers' ability to monitor and assess safety and environmental compliance in the field, result in numerous violations of legal requirements, and increase long-term costs of the program," according to the BNA article. Mr. Grumbly warned that "[d]elays in cleanups and waste disposal projects cause conditions to deteriorate, making problems more severe and increasing long-term costs," according to the BNA article. The fate of the defense authorization bill is uncertain at this time. The Senate may not approve the House decrease. On July 25, 1995, the Daily Environment Report (BNA) noted that a Senate panel increased the DoE budget for nuclear waste cleanup at defense facilities. The Senate Appropriations panel approved about \$724 million more than contained in the House version of the budget. *Senate Panel Boosts Money for DOE Cleanups by \$724 Million*, Daily Environment Report (BNA), LEXIS 1995 DEN 143 d5, July 26, 1995.

<sup>43</sup>*Supra* note 31. Further complicating matters for DoD, the Defense Environmental Restoration Account (DERA), 10 U.S.C. §2703, is used for cleanup actions at operating facilities while the BRAC budget is used for cleanups related to base closure. *Supra* note 37. In addition, DERA has been interpreted as being limited to DoD cleanup actions at facilities located in the United States, hence not to be used for environmental restoration at overseas installations. Wegman, *Cleaning Up Military Wastes*, *supra* note 7 at n.373. DERA funds appropriated for fiscal years 1995-1999 may not be used to pay fines or penalties imposed against DoD unless the fine or penalty is imposed because of an activity funded by DERA. 10 U.S.C. §2703(f).

is to request additional funding from Congress to pay the penalty.<sup>44</sup>

Another unique characteristic that distinguishes federal facilities from non-governmental entities is the fact that cleanup costs can be affected by the federal government's budget process. Funding may be made available only at certain times during the fiscal year. For example, funds made available at the end of the fiscal year may result in poor contractor performance and increased costs as the installation rushes through the government procurement process to obligate funds before the end of the fiscal year.<sup>45</sup> Similarly, funds are usually not available early in the fiscal year due to the budgetary mechanics of moving new funds through the system.

**E. Current Procedure for Environmental Cleanup at a Federal Facility -- A Thumbnail Sketch**

The obvious starting point is to determine whether CERCLA or RCRA applies. At many federal facilities, both may apply. CERCLA applies whenever there is a release or threatened release of a designated hazardous substance into the environment, or whenever there is a release or threatened release of a pollutant or contaminant that "may present an imminent and substantial danger to the public health or welfare."<sup>46</sup> However, RCRA may apply if the release is from a permitted RCRA facility, is on property that contains a permitted RCRA facility, or the release involves solid or hazardous waste that poses an imminent and substantial endangerment to health

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<sup>44</sup>Federal Facility Compliance Act; Enforcement Authorities Implementation, 58 Fed. Reg. 49044, 49045 n.5 (Sept. 21, 1993).

<sup>45</sup>GAO HIGH PRIORITY SITES, *supra* note 8 at 25-26.

<sup>46</sup>CERCLA section 104(a)(1), 42 U.S.C. §9604(a)(1). CERCLA will be discussed in greater detail in Part III.A. below.

or the environment.<sup>47</sup>

Next, the federal facility manager needs to know whether the site is on the NPL and whether there is any chance that the site could be placed on the NPL in the near future.<sup>48</sup> The federal facility manager must also determine whether the state in which the facility is located been delegated RCRA authority from EPA. After *United States v. Colorado*,<sup>49</sup> federal courts may be more willing to allow a state to assert its EPA-delegated RCRA authority at a federal CERCLA site, even at NPL sites. For NPL sites, CERCLA section 120 requires the federal agency operating the facility to negotiate an interagency agreement (IAG) with EPA for the "expeditious completion" of "all necessary remedial action". The public participation requirements of CERCLA section 117 apply to the IAG.<sup>50</sup> The agency must also negotiate with state and local governments concerning compliance with any state and local requirements. The cleanup process, under either CERCLA or RCRA, then begins.

There are several problems with this procedure. First, there is no clear guidance on how

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<sup>47</sup>See Part III.B. below; RCRA sections 7002, 7003, 42 U.S.C. §§6972, 6973.

<sup>48</sup>Generally, if a site is on the NPL, CERCLA governs. If a federal cleanup site is not on the NPL, then cleanup actions under CERCLA must follow state laws concerning removal and remedial action. CERCLA section 120(a)(4), 42 U.S.C. §9620(a)(4). The Tenth Circuit muddled these waters even more, however, in *United States v. Colorado* by holding that Colorado could assert its EPA-delegated RCRA authority at a federal CERCLA site regardless of the site's NPL status. 990 F.2d 1565 (10th Cir.1993), *cert. denied*, 144 S.Ct. 922 (1994). Another regulatory layer is added if the facility is being closed. In that case, the requirements added to CERCLA by the 1992 Community Environmental Response Facilitation Act (CERFA) also apply. Pub. L. No. 102- 426, s 3, 106 Stat. 2174, 2175 (codified as amended at 42 U.S.C. s 9620(h) (Supp. V 1993). CERCLA section 120(h) prevents the transfer of contaminated federal property until all necessary remedial action has been taken. This resulted in delays in the transfer and reuse of closed facilities. CERFA addresses this problem by requiring federal agencies to identify and segregate contaminated from uncontaminated parcels, and to make the uncontaminated parcels available for sale, lease, or other transfer in a timely manner. Wegman, *Cleaning Up Military Wastes*, *supra* note 7 at 911-918.

<sup>49</sup>990 F.2d 1565 (10th Cir.1993), *cert. denied*, 144 S.Ct. 922 (1994).

<sup>50</sup>CERCLA section 120(e)(2), 42 U.S.C. §9620(e)(2). In practice, there is generally less interest or pressure from EPA for an IAG for non-NPL sites. Telephone Interview with Bernard K. Schafer, Attorney Advisor, Air Force Legal Services Agency, Environmental Litigation Division, July 10, 1995.

to separate CERCLA cleanups from RCRA corrective action cleanups. At first glance, the line seems clear. RCRA corrective action generally deals with contamination from a treatment, storage, or disposal facility (TSDF) operating after November 19, 1980, and, if now closed, which obtained certified closure after January 26, 1983. CERCLA applies to any other spills, releases, or contamination discovered. But the RCRA definitions of a solid waste management unit (SWMU), regulated unit, and disposal can extend the coverage of RCRA corrective action to almost any spill, release, or contamination.<sup>51</sup>

The question of which statute governs is significant because the stringency of the cleanup standards that are applied to a site determines the cost and duration of the cleanup action. This in turn affects the ability of DoD to meet its cost and schedule objectives.<sup>52</sup> In addition, disagreements between federal and state authorities over the appropriate standards and over the governing statute create delays (and increasing costs) due to negotiation, conflicting enforcement

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<sup>51</sup>See Part III.B below. EPA defines SWMU (solid waste management unit) as “[a]ny discernible unit at which solid wastes have been placed at any time” and including any area at a “facility” where “solid wastes have been routinely and systematically released.” Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,808 (1990) (to be codified at 40 C.F.R. Parts 264, 265, 270, and 271). Such a release includes spillage or drippage in loading or unloading areas. It does not include a one-time spillage from a vehicle travelling across a facility, routine leakage from chemical product storage tanks, or releases from production processes. *Id.* at 30,808-30,809; Richard G. Stoll, *RCRA versus CERCLA -- Choice and Overlap*, C778 ALI-ABA 141, 154-156 (1992) [hereinafter Stoll, *RCRA versus CERCLA*]. Under RCRA corrective action, EPA considers a “facility” to include all contiguous property under the control of the owner/operator. Thus, the existence of a solid waste management unit (SWMU), as defined under RCRA, on a portion of the property subjects the entire property to RCRA corrective action requirements. For example, assume there are two parcels of land, Blackacre and Blueacre, both containing hazardous waste landfills and surface impoundments closed before 1979. The only difference between the two parcels is that in one isolated corner of Blackacre there is a small fenced in area that is permitted under RCRA for storage of hazardous waste in drums. RCRA corrective action regulations do not apply to Blueacre, but apply to all of Blackacre. Stoll, *RCRA versus CERCLA*, at 151.

<sup>52</sup>CBO, CLEANING UP DEFENSE INSTALLATIONS, *supra* note 1 at 23-25. The CBO study notes that the extent of this problem is not known. However, information from individual cases, such as Colorado’s Rocky Mountain Arsenal and California’s George and Mather Air Force bases, indicates that the impact from more stringent standards “can be substantial”. *Id.* at 24. Furthermore, depending on reasonable future use, the appropriate cleanup standard may not be the most stringent standard. *Id.* at 25.

actions, or litigation.<sup>53</sup>

Second, the potential exists for a state to exert control over the budget or over the environmental restoration priorities of a federal agency if the Tenth Circuit's "reconciliation" of RCRA and CERCLA in *United States v. Colorado*<sup>54</sup> is applied.<sup>55</sup>

Third, forcing a federal agency to negotiate with state and local governments at each facility requiring cleanup is contrary to Congress' goal in enacting CERCLA. As will be discussed below in Part III.A., the intent behind CERCLA was to provide a quick response to releases of hazardous substances. A system of duplicative or overlapping authority will not result in more expeditious responses to environmental hazards. Instead, such a system results in less effective and less prompt responses because of the lack of predictability; the inability to develop uniform approach to cleanup; and the delays inherent to negotiation.<sup>56</sup>

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<sup>53</sup>For example, the legal battle over standards and state-delegated RCRA authority at the Rocky Mountain Arsenal, Colorado, has dragged on for almost 10 years. See Jason H. Eaton, *Creating Confusion: The Tenth Circuit's Rocky Mountain Arsenal Decision*, 144 Mil. L. Rev. 126 (Spring 1995); Manus, *supra* note 18, at 332-339.

<sup>54</sup>990 F.2d 1565.

<sup>55</sup>Indeed, one analysis suggests that the attempts by states and citizens groups to impose their priorities at CERCLA cleanup sites pose a threat to the federal CERCLA program. Kyle E. McSarrow, *et.al.*, *A Decade of Superfund Litigation: CERCLA Caselaw from 1981-1991*, 21 Env'tl.L.Rep. (ELI) 10,367, at n.101-113 and accompanying text (July 1991) [hereinafter McSarrow, *Superfund Litigation*]. This article was written before the Tenth Circuit decision in *U.S. v. Colorado*, 990 F.2d 1565, holding that a state could assert its EPA-delegated RCRA authority at a CERCLA cleanup being conducted at an NPL site. Noting that the caselaw "is not entirely consistent and tends to be somewhat fact-specific," the authors observed "a clear trend to protect the federal program from being rendered ineffective by the efforts of states and citizen groups to set their own priorities for CERCLA resources." *Id.* For example, the article cites *United States v. Akzo Coatings of America, Inc.*, in which the court held that CERCLA preempted state attempts to assert supplementary, but inconsistent, remedies. 719 F. Supp. 571 (E.D. Mich. 1989), *aff'd*, 949 F.2d 1409 (6th Cir. 1991) (limiting a state's authority under CERCLA §121(e)(2) to the enforcement of applicable or relevant and appropriate requirements in a consent decree, and holding that CERCLA § 121(f) provides the exclusive mechanism for state review). The court explained that such state claims were in conflict with CERCLA because, if allowed, the defendants would be unable to comply with both federal and state requirements. *Id.* CERCLA preemption is discussed below in Parts III.A. and IV.C.

<sup>56</sup>As noted above, one GAO study found that it usually takes about 1 year to negotiate such agreement. GAO, FEDERAL FACILITIES ISSUES, *supra* note 7 at 4. Both the GAO and the Defense Environmental Response Task Force concluded that confusion and delay result from the involvement of multiple government agencies in cleanup (continued...)

### III. Statutory Framework

#### A. CERCLA

##### 1. Purpose and Congressional Intent

In 1980, during the post-election session, Congress signed into law the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as "Superfund".<sup>57</sup> CERCLA "provided 'for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive waste disposal sites.'"<sup>58</sup> The key intent behind the program was to compel those responsible for the site pollution (potentially responsible parties or "PRPs") either to conduct the cleanup or to reimburse the government for the costs of the cleanup. If PRPs could not be located or were unable to pay, the Superfund would pay for the cleanup action.<sup>59</sup> Prompt response to such

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<sup>56</sup>(...continued)

decisions. Wegman, *Cleaning Up Military Wastes*, *supra* note 7 at 898.

<sup>57</sup>42 U.S.C. §9601.

<sup>58</sup>State of Ohio v. U.S.E.P.A., 997 F.2d 1520, 1525 (D.C.Cir.1993)(quoting from Pub.L. No. 96-510, 94 Stat. 2767, 2767). CERCLA is generally retrospective, designed to remedy contamination from past disposal at inactive or abandoned sites. It also was designed to cover emergency responses to hazardous substance spills. U.S. v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1417 (6th Cir.1991). RCRA, on the other hand, is more prospective in nature, designed to "prevent contamination of the environment by regulating generators and handlers of hazardous wastes." Chemical Waste Management, Inc. v. EPA, 673 F.Supp. 1043, 1046 (D.Kansas 1987).

<sup>59</sup>Outline of Superfund Reform Proposal Released by Sen. Bob Smith, (R-NH) Chairman, Superfund, Waste Control and Risk Assessment Panel of Senate Environment and Public Works Committee (dated June 28, 1995), Daily Environment Report (BNA), 1995 DEN 126 d35 (June 30, 1995)(hereinafter cited as "Sen. Smith Proposal"). As noted in Sen. Smith's proposal, CERCLA was enacted in response to toxic nightmares in the 1970s such as Love Canal, New York, and the "Valley of the Drums" in Kentucky. To enhance the ability of the government to encourage participation from PRPs, CERCLA contained a regime of strict, retroactive, joint and several liability. The opposition of regulated entities to this liability structure is still very strong, as shown by Sen. Smith's proposal which seeks to repeal retroactive liability before 1981 under CERCLA. Taxes on the chemical and petroleum industries financed the Superfund. CERCLA was amended in 1986 when Congress enacted the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). SARA extended and expanded the Superfund taxes and authorized expenditures of \$ 8.5 billion through December 31, 1991. *Id.*

hazardous substance disposal problems was a primary concern in Congress.<sup>60</sup>

Statements in 1979-80 Congressional hearings discuss the need to deal with the “problem of abandoned and inactive hazardous waste disposal sites” through a permanent, national program that would reimburse those who incurred damages from such sites, and that would restore toxic waste sites.<sup>61</sup> The legislative history also evinces an intent to develop a program to deal with pollution outside the ambit of the Solid Waste Disposal Act<sup>62</sup> and to develop a national strategy rather than one based on state programs.<sup>63</sup>

An important aspect of CERCLA is that it allows EPA to act to address environmental problems quickly and without becoming entangled in litigation.<sup>64</sup> In light of CERCLA’s emphasis on prompt responses, the integration of CERCLA and RCRA should focus on the

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<sup>60</sup>See *United States v. Akzo Coatings of America Inc.*, 949 F.2d at 1416-18 (explaining that Congress enacted CERCLA “to ensure prompt and efficient cleanup of hazardous waste sites and to place the costs of those cleanups on the PRPs [potentially responsible parties].”).

<sup>61</sup>*Hazardous and Toxic Waste Disposal Field Hearings: Joint Hearings Before the Subcommittees on Environmental Pollution and Resource Protection of the Senate Committee on Environment and Public Works*, 96th Cong., 1st Sess., pt. 2 (1979)(Opening statement of Sen. Moynihan, May 18, 1979)(reprinted in Wilmer, Cutler, & Pickering, *Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980* (Lexis)). For more information on the legislative history of CERCLA, see 1 *The Environmental Law Institute, Superfund: A Legislative History* xiii (1983); Senate Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)*, 97th Cong., 2d Sess. (Comm. Print 1983); Frank Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 Colum. J. Env. L. 1 (1982).

<sup>62</sup>(RCRA) 42 U.S.C. §6901.

<sup>63</sup>*Senate Committee on Environment and Public Works, Environmental Emergency Response Act*, S. Rep. No. 848, 96th Cong., 2d Sess. 16 (1980)(reprinted in Wilmer, Cutler, & Pickering). That report stressed the need for a program that, unlike SWDA, would provide a fund to cleanup the consequences of improper dumping, that would not be limited to hazardous wastes, and that would compensate victims. The report also maintained that a comprehensive national strategy was needed because experience had shown that state programs were generally inadequate. The report explained that state agency actions were “sometimes haphazard and are hampered by a lack of funds”; states have demonstrated an unwillingness to assume the expense of cleanup without a matching federal commitment; states are often unwilling to hold responsible major industries that are economically significant in the state; and states are unable or unwilling to obtain the technical expertise and take the time required to bring lawsuits against polluters when appropriate.

<sup>64</sup>*Southern Pines Association v. U.S.*, 912 F.2d 713, 716 (4th Cir.1990)(explaining that pre-enforcement judicial review of remedial action would “interfere with CERCLA’s policy of prompt agency response.”).



avoidance of duplicative actions and maximization of the number of cleanup actions.<sup>65</sup> At sites where both CERCLA and RCRA corrective action can apply, at least one federal circuit has held that EPA can treat the two statutes as alternative authorities for effecting cleanup, selecting the statute most likely to accomplish expeditiously the required cleanup action.<sup>66</sup> Since CERCLA section 104 response authority has been delegated to DoD,<sup>67</sup> the decision whether to conduct a cleanup action under CERCLA or RCRA should be a policy decision appropriate for DoD resolution.<sup>68</sup>

Critics of the overall CERCLA program, and there are many, attack the program as unresponsive, inefficient, and unfair.<sup>69</sup> Criticism tends to focus on the liability system, which is attacked as being unfair and as resulting in more litigation than cleanup; the remedy selection

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<sup>65</sup>EPA seems to be focusing on these goals as well. The concept of parity between CERCLA and RCRA currently being considered by EPA recognizes that cleanup results are similar under either statute, and that duplicative requirements waste time and resources. *EPA Crafts New Guidance to Harmonize RCRA and Superfund Cleanups*, 16 INSIDE EPA 1, 8 (July 7, 1995). Similarly, EPA's proposed RCRA deletion/deferral policy (allowing for the deletion or deferral from the NPL if the site contamination is being or will be adequately addressed under RCRA corrective action) recognizes that CERCLA and RCRA have comparable environmental goals, and recognizes the need to avoid duplicative requirements, to avoid confusion over which statute "has primacy", and to use Superfund monies in a more cost-effective manner. The National Priorities List for Uncontrolled Hazardous Waste Sites; Deletion Policy for Resource Conservation and Recovery Act Facilities, 60 Fed. Reg. 14641, 14642 (1995) (to be codified at 40 C.F.R. Part 300); see discussion in Part IV.D. *supra* page 85. It should be noted that EPA specified that this RCRA deletion policy does not apply to federal facility sites since they are normally not eligible for Superfund monies. *Id.* EPA also considers IAGs an adequate means to avoid duplication of efforts. *Id.* As discussed *supra* in Part II at note 15 and *infra* in Part IV, this paper argues that IAGs are not the best way to approach this problem.

<sup>66</sup>*Apache Powder Co. v. U.S.*, 968 F.2d 66, 68-69 (DC Cir.1992). In this case, EPA had listed plaintiff's facility on the NPL. Apache claimed that the contamination at the site could be cleaned up under RCRA. Therefore, asserted Apache, EPA violated its policy of not listing a site on the NPL if cleanup could be conducted pursuant to RCRA Subtitle C. *Id.* at 68-69. In holding that EPA did not violate its policy, the court referred to RCRA as CERCLA's "sibling statute" and as providing "alternative authority by which EPA can bring about certain cleanup operations." *Id.* at 67-68.

<sup>67</sup>Executive Order No. 12580, discussed *infra* at note 79.

<sup>68</sup>See discussion *infra* in Part IV.

<sup>69</sup>See Sen. Smith's 1995 proposal for reforming CERCLA, *supra* note 59. Much of this criticism applies to the private sector, but is provided here as background information.

process which delays cleanup and increases costs; the allegedly inadequate participation of state and local governments, as well as citizens; and the "economic disincentives" for redevelopment and reuse that often result from being listed as a Superfund site.<sup>70</sup>

## 2. Cleanup Authority

A key feature of the CERCLA legal landscape is the authority to conduct cleanup actions. CERCLA section 104(a)(1) authorizes the President to undertake any response measure he "deems necessary to protect the public health or welfare or the environment."<sup>71</sup> Even though the response measure must be consistent with the national contingency plan (NCP),<sup>72</sup> this section provides a broad response authority. A response measure can consist of removal action,<sup>73</sup>

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<sup>70</sup>*Id.* Part of the problem with CERCLA is that the scope of the program today is far beyond that envisioned by its drafters in 1980. As noted in Sen. Smith's proposal: "When CERCLA was enacted, it was expected that only a few hundred sites would need to be cleaned up and that the program would require relatively modest funding. Both of these expectations have proven to be inaccurate. Currently, there are over 1,300 sites on the Superfund list (known as the National Priorities List or "NPL"), and during the last few years, EPA has been adding an average of approximately 30-40 new sites per year to the NPL. To date, the construction of long-term cleanup remedies have been completed at fewer than 300 contaminated sites." Of course, the estimated cost of the program has risen with the increase in the number of contaminated sites. Congress set aside \$1.6 billion for Superfund in 1980. In 1986, the amount in the fund was increased to \$8.5 billion, and in 1990 the fund was again increased by \$5.1 billion. Total cost of the program since 1980, including PRP settlement costs, is estimated to be more than \$25-30 billion. *Id.*

<sup>71</sup>42 U.S.C. §9604(a)(1).

<sup>72</sup>42 U.S.C. §9605; 40 C.F.R. Part 300.

<sup>73</sup>The statute defines "remove" or "removal" as "the cleanup or removal of released hazardous substances from the environment". 42 U.S.C. §9601(23). Removal actions are generally short-term in nature and include "such actions as may be necessary" in response to the *threat* of a release, in order to monitor and evaluate the release or threatened release, in order to dispose of removed material, and "to prevent, minimize, or mitigate damage to the public health or welfare or to the environment". Removal actions also include measures to limit access to the site, provisions for evacuation, temporary housing, and alternative water supplies, and emergency assistance. *Id.*; 40 C.F.R. §300.415; J. Stanton Curry, James J. Hamula, & Todd W. Rallison, *The Tug-of-War Between RCRA and CERCLA at Contaminated Hazardous Waste Facilities*, 23 Arizona State L.J. 359, 369-70 (1991) [hereinafter *Tug-of-War*].

arrangement for removal, remedial action,<sup>74</sup> or any other response action. This section gives the President the authority to respond whenever there is a release or the “substantial threat” of a release<sup>75</sup> of any hazardous substance, or a release or the substantial threat of a release of any pollutant or contaminant that “may present an imminent and substantial danger to the public health or welfare.”<sup>76</sup> CERCLA response authority is triggered by a release or the substantial threat of a release of a hazardous substance into the environment, or of any pollutant or contaminant that poses an imminent and substantial danger to the public health or welfare.<sup>77</sup>

The National Contingency Plan (NCP), mentioned above, is the body of regulations

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<sup>74</sup>The statute defines “remedy” or “remedial action” as “actions consistent with permanent remedy taken instead of or in addition to removal actions”. 42 U.S.C. § 9601(24); Curry, Hamula, & Rallison, *supra* note 73. Remedial actions focus on permanent prevention or minimization. As such, remedial actions can include storage, confinement, dredging or excavation, on-site treatment, off-site transport and treatment, and permanent relocation of residents and businesses. 42 U.S.C. §9601(24).

<sup>75</sup>“Release” is defined under CERCLA to mean “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)”. CERCLA section 101(22), 42 U.S.C. §9601(22)). This term does not apply to releases resulting in exposure only to workers in a workplace which are actionable against the employer; engine exhaust emissions; certain releases from nuclear incidents covered by the Atomic Energy Act of 1954, 42 U.S.C. §2011 et seq.; and to “normal” applications of fertilizer. Release generally means release into the environment. For example, a release of asbestos *inside* a building, with no indication of a leak to the outside, was recently held to be outside the ambit of CERCLA. *G.J. Leasing Co., Inc. v. Union Electric Co.*, 54 F.3d 379, 384 (7th Cir.1995)(citing 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1360 (9th Cir.1990)).

<sup>76</sup>CERCLA section 104(a)(1), 42 U.S.C. §9604(a)(1). A hazardous substance, as defined in CERCLA §101(14), is any substance designated under the Clean Water Act, 33 U.S.C. §1321(b)(2)(A) or listed as a toxic pollutant under that Act, 33 U.S.C. §1317(a); designated under CERCLA, 42 U.S.C. §9602; considered a hazardous waste under the Solid Waste Disposal Act, 42 U.S.C. §6921; listed as a hazardous air pollutant under the Clean Air Act, 42 U.S.C. §7412; or “any imminently hazardous chemical substance or mixture” that EPA has addressed under the Imminent Hazards section of the Toxic Substances Control Act, 15 U.S.C. §2606 (“Imminently hazardous chemical substance or mixture” is defined as “a chemical substance or mixture which presents an imminent and unreasonable risk of serious or widespread injury to health or the environment.” 15 U.S.C. §2600(f)). The term “hazardous substance” does not include petroleum or any petroleum fraction not specifically listed in the above references, nor does it include natural gas fuels. The term “pollutant or contaminant”, defined in CERCLA §101(33), includes any substance (including “disease-causing agents”) that could directly or indirectly cause harm to any organism or its offspring. This definition is very broad in that the harm that “will or may reasonably be anticipated” to result from exposure to the substance can include genetic mutation and “behavioral abnormalities”. See *Central Data Corp. v. SCSC Corp.*, 53 F.3d 930, f.n.8 (8th Cir.1995)(degree of causation of harm is unclear). Like the term “hazardous substance”, this term does not include petroleum or natural gas fuels. 42 U.S.C. §9601(33).

<sup>77</sup>42 U.S.C. §9604(a)(1); 40 C.F.R. §§300.3 & 300.400; *supra* note 76.

designed to implement CERCLA.<sup>78</sup> The President delegated most of his response authority under CERCLA to DoD for releases or threatened releases “where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control” of DoD.<sup>79</sup> While this delegation is subject to the delegations to three other federal agencies<sup>80</sup> and “must be exercised consistent with the requirements of Section 120 of the Act”,<sup>81</sup> it nonetheless establishes DoD as the lead agent for CERCLA cleanup actions. EPA, through the NCP, recognizes that DoD is the lead authority for NCP response to DoD for releases on or from DoD facilities or vessels.<sup>82</sup>

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<sup>78</sup>*Supra* note 72; *Ohio v. EPA*, 997 F.2d at 1525; 40 C.F.R. §§300.1, 300.2, 300.100.

<sup>79</sup>Executive Order No. 12580, Sec. 2.(d), January 23, 1987, 52 Fed. Reg. 2923 (amended by Executive Order 12777, October 18, 1991, 56 Fed. Reg. 54757). Specifically, this section delegates the following functions to DoD and DoE: removal and remedial action authority under CERCLA §104(a); authority to investigate, coordinate investigations, and monitor releases or threatened releases under CERCLA §104(b); authority to select the remedial action under CERCLA §104(c)(4); authority to establish an administrative record to serve as a basis for the selection of the remedial action and to establish procedures for public participation in the process under CERCLA §113(k); responsibility to provide notice and comment procedures, and to explain any differences between the final plan and actual actions taken, under CERCLA §117(a) & (c); authority to indemnify response action contractors under CERCLA §119; and authority to select the applicable or relevant and appropriate requirements upon which the remedial action is based, under CERCLA §121. Note that under §121(d)(4), DoD or DoE has the discretion to select a remedial action that does not meet an applicable or relevant and appropriate standard, as long as one of the six listed conditions are met and as long as the remedial action “assures protection of human health and the environment”.

<sup>80</sup>The delegation to DoD and DoE is subject to Sec. 2(a), (b), and (c) of the Executive Order. The delegations in those subsections, however, do not detract significantly from the scope of the authority delegated to DoD and DoE. Subsection (a) of Executive Order No. 12580 delegates investigative authority under CERCLA §104(b)(1) to the Secretary of Health and Human Services when disease or illness may be attributable to a release. Subsection (b) delegates the promulgation of regulations and guidelines under CERCLA §§104(e)(7)(C), 113(k)(2), 119(c)(7), and 121(f)(1) to the EPA Administrator. Finally, subsection (c) delegates certain emergency functions, such as relocation and evacuation, to the Director of the Federal Emergency Management Agency.

<sup>81</sup>42 U.S.C. §9620.

<sup>82</sup>The definition of “lead agency”, including when DoD acts as lead agency, is found at 40 C.F.R. §300.5. 40 C.F.R. §300.120(a) lists the responsibilities of the OSC/RPM (On-Scene Commander/Remedial Project Manager). 40 C.F.R. § 300.120(c) and (d) defines DoD responsibilities for releases on or from a DoD facility or vessel. Initially, then, the response to any release of a hazardous substance from a DoD facility or vessel is subject to the NCP and CERCLA, unless the source of the release is clearly a permitted RCRA facility. Even if the release is not from such a facility, the RCRA corrective action regulations discussed in Part III.B, *infra*, could arguably drag the release into the realm of RCRA corrective actions. See RCRA section 7003, 42 U.S.C. §6973 (authorizing the EPA Administrator to respond to imminent hazards); discussion of the EPA definition of a “SWMU” (solid waste management unit), *infra* (continued...)

Two aspects of CERCLA should be considered at this point. First, one should know the geographical extent of CERCLA authority at the cleanup site. Second, we should consider the role of the lead agency. The geographical extent of CERCLA authority at the site, is helpful when considering whether to proceed under RCRA or CERCLA.<sup>83</sup> When a release occurs, the size of the CERCLA site is determined by the size of the contaminated area plus nearby areas needed for the cleanup action. Thus, under CERCLA, "on-site" is defined as the "areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."<sup>84</sup> It is also important not to confuse the term "installation" or "base" with the term "facility". In the CERCLA universe, a military base could contain several "facilities". CERCLA defines a facility as "any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited,

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<sup>83</sup> <sup>2</sup> ( c o n t i n u e d )  
at page 51. With regards to an emergency involving a release from a RCRA facility or SWMU, however, the plain language of CERCLA indicates that CERCLA governs the response until the emergency condition is over. Again it must be emphasized that the intent behind the expansion of RCRA corrective action, i.e., to prevent current RCRA facilities from becoming future Superfund sites, is irrelevant at federal facilities simply because federal facilities are generally not eligible for Superfund assistance. CERCLA section 111(e)(3), 42 U.S.C. §9611(e)(3). At most federal facilities the primary question is not who will pay, but how do we clean this up? Therefore, the CERCLA authority should be preeminent and the decision whether to conduct the cleanup under CERCLA or RCRA, unless clearly governed by a valid RCRA permit, should be made by the federal agency as lead agency.

<sup>83</sup>The geographical extent of cleanup authority at a RCRA corrective action site is discussed in the RCRA section, *infra* at page 46.

<sup>84</sup>40 C.F.R. §300.5. This definition gains significance in light of the "off-site rule" which requires off-site facilities to have permits or interim status under RCRA in order to receive wastes from CERCLA cleanups. 58 Fed. Reg. 49,200 (1993) (codified at 40 C.F.R. §300.440); 40 C.F.R. §300.400(e)(2); Chemical Waste Management, Inc. v. EPA, 56 F.3d 1434 (D.C.Cir.1995). Remediation wastes treated or stored "on-site" are not subject to RCRA permit requirements. 40 C.F.R. §300.400(e)(1).

stored, disposed of, or placed, or otherwise come to be located".<sup>85</sup>

The definition of a lead agency will be discussed more fully in Section IV.B.<sup>86</sup> Suffice it to note at this point that DoD, as lead agency, is granted extensive authority to respond to releases under CERCLA. Other key provisions of CERCLA defining the role of the applicable federal agency are discussed below. This discussion will focus on three areas. First, this section will examine Section 113(h), dealing with the withdrawal of jurisdiction during the pendency of a CERCLA cleanup action. Second, it will consider the savings provisions, such as Sections 106(a), 114(a), 120(i), and 302(d) that address compliance with RCRA and with state and local requirements. Third, it will examine CERCLA provisions, such as sections 104, 121, and 122, that grant EPA or the designated federal lead agency preeminent authority at a CERCLA site.

### 3. Section 113(h) -- How Complete a Bar to Judicial Review?

CERCLA was intended to minimize interference from legal challenges during the response action so EPA would be free to focus on the response action.<sup>87</sup> Thus, CERCLA section

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<sup>85</sup>CERCLA section 101(9), 42 U.S.C. §9601(9). While CERCLA focuses on the area of contamination, RCRA follows property boundaries in defining a "facility". Thus, EPA has explained that the term "facility" is synonymous with "site" or "release". The National Priorities List for Uncontrolled Hazardous Waste Sites; Deletion Policy for RCRA Facilities (EPA Notice of Policy Statement), 60 Fed. Reg. 14641, 14643 at n.2 (1995) (to be codified at 40 C.F.R. Part 300). In comparison, RCRA defines a "facility" as "all contiguous property under the control of the owner or operator seeking a Subtitle C permit". *Id.* (Citing 58 Fed. Reg. 8664, February 16, 1993).

<sup>86</sup>*Infra* page 79.

<sup>87</sup>*Southern Pines Assoc. v. U.S.*, 912 F.2d at 716, *supra* note 64. This case involved an EPA compliance order issued to Southern Pines for a violation of the Clean Water Act (CWA), 33 U.S.C. §§1251 *et seq.* The violation consisted of discharging fill material into wetlands without a permit. Southern Pines argued that pre-enforcement judicial review of EPA's jurisdiction over the construction site in question was proper, relying on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). However, the Fourth Circuit found that the CWA precluded such review. The court explained that the determination of whether a statute precludes judicial review involves an examination of the statutory language, and "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." 912 F.2d at 716 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). The Fourth Circuit cited CERCLA as another environmental statute that precludes pre-enforcement judicial

(continued...)

113(h) bars any challenges to a section 104 response action, unless the challenge falls under one of five listed exceptions.<sup>88</sup> There is a split in the federal circuits on the scope of this jurisdictional bar. The Tenth Circuit, in *United States v. Colorado*, recently held that CERCLA section 113(h) did not bar challenges by a state seeking to assert its EPA-delegated RCRA authority.<sup>89</sup> The overall impact of the case is most likely limited, due to its unique facts.<sup>90</sup> The impact of the case is limited further, in that the Tenth Circuit seems to be in minority on this issue. However, *United States v. Colorado* is of obvious significance for any federal facility located within the

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<sup>87</sup>(...continued)

review, citing CERCLA sections 104 (response authorities), 106 (abatement actions), and 107 (liability) as allowing EPA to order cleanup of a site before bringing suit. *Id.* The Fourth Circuit explained that before 1986, courts held that judicial review should be precluded because it would “interfere with CERCLA’s policy of prompt agency response.” *Id.* (Citations omitted). In 1986, Congress added CERCLA section 113(h) which “specifically precludes federal [court] jurisdiction over pre-enforcement remedial action.” *Id.*

<sup>88</sup>42 U.S.C. §9613(h): “Timing of review. No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 [42 U.S.C. § 9621] (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104 [42 U.S.C. §9604], or to review any order issued under section 106(a) [42 U.S.C. §9606(a)], in any action except one of the following:

(1) An action under section 107 [42 U.S.C. §9607] to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) [42 USCS §9606(a)] or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2) [42 USCS §9606(b)(2)].

(4) An action under section 310 [42 USCS §9659] (relating to citizens suits) alleging that the removal or remedial action taken under section 104 [42 USCS §9604] or secured under section 106 [42 USCS §9606] was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 106 [42 USCS §9606] in which the United States has moved to compel a remedial action.

<sup>89</sup>990 F.2d 1565 (10th Cir.1993). The Tenth Circuit held that a CERCLA response action, whether or not the site is on the NPL, does not bar a RCRA enforcement action or an equivalent action by a state under its EPA-delegated RCRA authority. *Id.* at 1578-80.

<sup>90</sup>Manus, *Federalism under Siege*, *supra* note 18 at 330. Professor Manus argues that the general applicability of the case is limited because it involves a federal agent, the Army, that is responsible for administering CERCLA and conducting the cleanup, and because the state involved was delegated RCRA authority by EPA. He does admit the “undeniable significance” of the decision as one upholding a state’s assertion of authority at a CERCLA site against a federal agency’s efforts to preempt that authority. For federal facilities, of course, these facts render the 10th Circuit’s holding more generally applicable and of great significance.

Tenth Circuit.

The Tenth Circuit relied on 42 U.S.C. §9614(a) which provides that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within [the] State."<sup>91</sup> CERCLA section 114 will be discussed further below, but suffice it to note at this point that reliance on section 114(a) to allow concurrent state jurisdiction at a CERCLA site renders CERCLA sections 120 and 121 useless, and is contrary to the intent of the statute. A majority of the federal circuits interpret the section 113(h) bar as precluding all challenges removal or remedial action being conducted pursuant to CERCLA section 104, until the action or a distinct portion thereof is complete.<sup>92</sup> In the most recent case, *McClellan Ecological*

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<sup>91</sup>990 F.2d at 1576. For more detailed discussions of *United States v. Colorado*, see Manus, *Federalism under Siege*, *supra* note 18; Scott D. Stubblebine, *Colorado v. United States Revisited -- Why the Tenth Circuit and Supreme Court Were Wrong*, 5 Fed. Facilities Envtl. J. 99 (Summer 1994) [hereinafter Stubblebine, *Colorado v. United States*]; Eaton, *Creating Confusion*, *supra* note 53.

<sup>92</sup>Obviously, if the challenge falls within one of the five exceptions listed in section 113(h) it will be allowed. The 113(h) jurisdictional bar has been applied to enforcement of other environmental challenges and constitutional challenges. See *McClellan Ecological Seepage Situation (MESS) v. Perry*, 47 F.3d 325 (9th Cir.1995)(CERCLA section 113(h) bars any challenge to a CERCLA section 104 cleanup, including challenges based on other statutes besides CERCLA and citizen suits); *Arkansas Peace Ctr. v. Department of Pollution Control*, 999 F.2d 1212, 1217 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1397 (1994) (holding that section 113(h) bars a challenge based upon RCRA); *North Shore Gas Co. v. EPA*, 930 F.2d 1239 (7th Cir.1991)(section 113(h) bars a challenge brought under NEPA and RCRA. The court noted that "the purpose of section 113(h) is to prevent litigation from delaying remediation." 930 F.2d at 1244); *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir.1991)(applying 113(h) bar to a constitutional challenge); *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3rd Cir.1991)(section 113(h) bars a claim under the National Historic Preservation Act (NHPA), 16 U.S.C. §470 *et seq*); *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir.1990)(section 113(h) deprives a court of jurisdiction to hear a claim under the Administrative Procedure Act (APA) that an EIS is required under NEPA); *Alabama v. EPA*, 871 F.2d 1548 (11th Cir.1989), *cert. denied*, *Alabama ex rel Siegelman v. EPA*, 493 U.S. 991 (1989)(Constitutional challenge and challenge based on alleged CERCLA violation barred by section 113(h)). Two circuits, the Tenth and the First, have applied a narrower scope to the CERCLA section 113(h) bar. In *U.S. v. Colorado*, the Tenth Circuit held that a CERCLA response action, whether or not the site is on the NPL, does not bar a RCRA enforcement action or an equivalent action by a state under its EPA-delegated RCRA authority. 990 F.2d 1565, 1578-80 (10th Cir.1993). In *Reardon v. U.S.*, 947 F.2d 1509 (1st Cir.1991), the court held that 113(h) did bar the plaintiff's statutory claims under CERCLA, but did not bar the plaintiff's constitutional claim that CERCLA's lien provisions violate the due process clause of the Fifth Amendment. The court reasoned that section 113(h) did not bar the due process claim because it was a challenge to the statute itself, not to the remedial action, the Congressional intent to preclude constitutional claims must be clear, and the due process claim would not delay the remedial action. 947 F.2d at 1514. The court confined its holding to constitutional (continued...)



*Seepage Situation (MESS) v. Perry*, the Ninth Circuit interpreted the scope of section 113(h) broadly: "On its face, then, section 113(h) precludes contemporaneous challenges to CERCLA cleanups. MESS interprets this section, however, to mean that federal courts are jurisdictionally barred from reviewing only those challenges to CERCLA cleanup actions brought under CERCLA provisions. In our view, however, section 113(h) is not so limited. Section 113(h) is clear and unequivocal. It amounts to a 'blunt withdrawal of federal [judicial] jurisdiction.'"<sup>93</sup>

One argument against such an expansive reading of section 113(h) is that it will allow federal facilities to escape RCRA liability by hiding under the CERCLA umbrella.<sup>94</sup> The Ninth Circuit dismissed this argument by noting that the interagency agreement (IAG) in that case incorporated substantive provisions from both RCRA and the Clean Water Act,<sup>95</sup> as well as all relevant hazardous waste statutes. Furthermore, the court explained that this withdrawal of jurisdiction does not constitute an effort to evade the requirements of RCRA. Rather, it is based on Congress' policy decision to promote swift cleanup actions.<sup>96</sup>

Finally, as discussed in Part IV below, the focus of cleanup actions should be on the actual cleanup to appropriate standards, rather than on the means by which the cleanup is

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<sup>92</sup>(...continued)  
challenges to the CERCLA statute itself, and explained that it was not deciding that all constitutional claims are not barred by section 113(h). *Id.* For an analysis of cases involving challenges to CERCLA cleanup actions during the period 1981-1991, see McSlarrow, *Superfund Litigation*, *supra* note 55 at n.58-61, 252-269 and accompanying text.

<sup>93</sup>MESS, 47 F.3d at 328 (citing *North Shore Gas Co. v. E.P.A.*, 930 F.2d 1239, 1244 (7th Cir. 1991)). The court continued, stating that "[c]ontrary to MESS's position, the unqualified language of the section precludes 'any challenges' to CERCLA Section 104 cleanups, not just those brought under other provisions of CERCLA." 47 F.3d at 328 (citing *Arkansas Peace Ctr. v. Department of Pollution Control*, 999 F.2d at 1217; *North Shore Gas*, 930 F.2d at 1244). The court further defined the ambit of the section 113(h) bar by explaining that it does bar citizen suits, since the plain language of the statute bars "any challenge". 47 F.3d at 328 n.4.

<sup>94</sup>MESS, 47 F.3d at 329.

<sup>95</sup>Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387.

<sup>96</sup>MESS, 47 F.3d at 329.

accomplished. Under such a practical approach, it should not matter whether the cleanup is accomplished under CERCLA or under RCRA.<sup>97</sup> In addition, the federal agency involved normally will pay for the cleanup,<sup>98</sup> so the issue of escaping RCRA liability is a red herring for federal facility cleanup actions. Also in reference to federal facilities, it has been argued that since CERCLA section 113(h) bars challenges to remedial actions conducted under CERCLA section 104, it is not applicable to cleanup actions at federal facilities conducted pursuant to CERCLA section 120.<sup>99</sup> The court in *Werlein* rejected that argument, explaining that DoD's response authority proceeds from CERCLA sections 104 (response authorities) and 115 (the

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<sup>97</sup>See discussion *infra* at page 85 concerning EPA's recent proposal of parity between RCRA and CERCLA. EPA's guidance and policy documents indicate that it recognizes that comparable cleanup results are obtained under either statute. See, *EPA Crafts New Guidance to Harmonize RCRA and Superfund Cleanups*, 16 INSIDE EPA 1, 8 (July 7, 1995)(Quoting an EPA Region X policy that states that Region X believes "that the environmental outcome reached at a site managed under CERCLA or RCRA will be similar"); The National Priorities List for Uncontrolled Hazardous Waste Sites; Deletion Policy for Resource Conservation and Recovery Act Facilities, 60 Fed. Reg. 14641, 14642 (1995) (to be codified at 40 C.F.R. Part 300)(recognizing that RCRA and CERCLA have comparable environmental goals).

<sup>98</sup>Superfund monies are generally not available for remedial actions at federally owned facilities, unless it involves the provision of alternative water supplies or falls under CERCLA section 111(c). 42 U.S.C. §9611(e)(3).

<sup>99</sup>*Werlein v. U.S.*, 746 F.Supp. 887, 891 (D.Minn.1990), *vacated, claim dismissed* 793 F.Supp. 898 (D.Minn. 1992)(Pursuant to a settlement agreement, the United States moved to vacate the earlier ruling which certified the class action for challenges. The United States also moved to dismiss the class action claims without prejudice. Thus, the court concluded that the dispute over the CERCLA section 113(h) issue was mooted by the settlement.); *contra* *U.S. v. Allied-Signal Corp.*, 736 F.Supp. 1553 (N.D. Cal. 1990). *Allied-Signal Corp.* involved the question of whether, under CERCLA section 113(j) [judicial review], a cleanup action by the Navy should be subject on to deferential review based on the administrative record. The court held that a *de novo* standard of review was appropriate, rather than the more limited judicial review under CERCLA section 113(j). The court reasoned that the stricter standard of review was required because due process concerns were raised by the limited EPA participation in the remedial action and the Navy's vested interests in the remedial action (the Navy had sealed the administrative record and allowed no discovery beyond the record). Of significance to this paper is the court's acceptance of the defendant's argument that CERCLA section 113(j) did not apply here because the remedial action was conducted pursuant to CERCLA section 120 and SARA section 211 (Defense Environmental Restoration Program or DERP), rather than CERCLA section 104. 736 F.Supp. at 1557-58. The court in *Werlein* rejected a similar argument, holding that remedial actions at federal facilities are conducted pursuant to CERCLA section 104 authority, and that CERCLA section 120 implements that authority.

President's delegation authority), and from Executive Order 12580.<sup>100</sup> CERCLA section 120 does not grant DoD any response authority, rather it provides a roadmap for the application of DoD's response authority.<sup>101</sup>

The Ninth Circuit in *MESS v. Perry* concluded that ordering compliance with RCRA reporting and permitting requirements would constitute interference with CERCLA cleanup in progress in violation of CERCLA section 113(h).<sup>102</sup> Other circuits have reached similar conclusions in interpreting the scope of the jurisdictional bar in CERCLA section 113(h). In the case of *Arkansas Peace Center v. Dept. of Pollution Control*, involving a citizen suit challenging remedial action based on alleged violations of other statutes, the Eighth Circuit held that the challenge was barred by CERCLA section 113(h).<sup>103</sup> The Eighth Circuit held that the plain language of 113(h) bars a challenge until the remedial action is completed.<sup>104</sup> The Eighth Circuit distinguished *U.S. v. Colorado* on the basis that it was a state action to enforce its own hazardous waste requirements on a site where a CERCLA response action was already

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<sup>100</sup>746 F.Supp. at 891. Executive Order No. 12580, delegating the President's response authority pursuant to CERCLA section 104 to DoD, is cited *supra* at note 79.

<sup>101</sup>746 F.Supp. at 891. The court reasoned that Executive Order No. 12580 would be rendered irrelevant if response authority at federal facilities derived from CERCLA section 120 instead of section 104: "If [CERCLA] section 9604 did not apply to federal facilities, then there would be no reason for the President to delegate response authority to the Secretary of Defense. If, as the Court believes, section 9604 applies to federal facilities, then there is no rationale for including a second CERCLA section which separately empowers remedial action." *Id.* at 892.

<sup>102</sup>47 F.3d at 330. *MESS* sought imposition of RCRA section 3010 requirements in addition to the requirements in the IAG (which incorporated RCRA obligations). The court rejected this relief, reasoning that the additional reporting requirements under RCRA section 3010 would interfere with the remedial action, and that the interference consisted of the imposition of RCRA permit requirements. The court stated that a direct relationship between the relief sought and the remedial action was needed to constitute interference with the remedial action. By way of explanation, the court opined that imposition of minimum wage requirements would not constitute improper interference with CERCLA cleanup. *Id.*

<sup>103</sup>999 F.2d at 1217; *see* *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir.1991); *Boarhead Corp v. Erickson*, 923 F.2d 1011, 1024 (3d Cir.1991).

<sup>104</sup>999 F.2d at 1216-17.

underway. But this distinction is counter to the express language of the statute. As the Ninth Circuit held in *MESS*, CERCLA section 113(h) does not distinguish between plaintiffs -- it bars any challenge.<sup>105</sup> State action is not listed under any of the exceptions to the 113(h) rule.

Finally, section 113(h) sets up a temporary jurisdictional bar, rather than a permanent jurisdictional bar. It is in effect only until the remedial action, or a distinct and separable portion thereof, is complete.<sup>106</sup> In *North Shore Gas Co. v. EPA*,<sup>107</sup> the Seventh Circuit held that "the purpose of [CERCLA] section 113(h) is to prevent litigation from delaying remediation."<sup>108</sup> The court noted that caselaw and the legislative history indicate that the purpose of 113(h) is not to defeat the aggrieved person's right of judicial review of agency action, "but merely to postpone the exercise of the right to the completion of the remedial action."<sup>109</sup> It should also be noted that in the case of federal facility cleanup actions, the delaying litigation is not from the entity conducting the remedial action, but rather from other entities (such as state or local governments, or private groups) seeking to control the cleanup action. Erecting a temporary jurisdictional bar against such litigation in order to allow cleanup actions to progress is consistent

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<sup>105</sup>47 F.3d at 328.

<sup>106</sup>*Werlein v. U.S.*, 746 F.Supp. at 894-95.

<sup>107</sup>930 F.2d 1239 (7th Cir.1991).

<sup>108</sup>930 F.2d at 1244.

<sup>109</sup>930 F.2d at 1245, citing *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir.1990), cert. denied, 111 S.Ct. 509 (1990)(Case involved a citizen suit challenged a consent decree on the basis that an Environmental Impact Statement had not been prepared in compliance with NEPA. The court applied the section 113(h) bar, reasoning that a judicial inquiry concerning procedure constituted a challenge in that it resulted in the very delays Congress sought to avoid. The court also noted that section 113(h) is entitled "Timing of Review".); *Alabama v. EPA*, 871 F.2d 1548, 1557-58 (11th Cir.1989).

with the overall purpose of CERCLA.<sup>110</sup>

#### 4. Preemption Under CERCLA

Congressional intent, as expressed in the language of a statute, is a traditional indicator of federal preemption of state law.<sup>111</sup> However, a clear intent on this issue is difficult to glean from CERCLA. On the one hand, provisions like section 104(a) [removal and remedial action by the President], section 113(h) [timing of review, jurisdictional bar], section 121(f)(1) [state involvement], and section 122(e)(6) [requiring Presidential approval of any remedial action taken by PRP at a site where federal cleanup action has started] support federal preemption at a CERCLA site. On the other hand, section 106(a) [federal abatement actions in addition to state or local actions], section 114(a) [savings clause concerning state hazardous substance requirements], section 120(a)(4) [applying state laws concerning removal and remedial action to non-NPL federal sites] and 120(i) [requiring compliance with the Solid Waste Disposal Act (RCRA)], and section 302(d) [savings clause concerning liability and obligations] support non-preemption.<sup>112</sup>

CERCLA §106(a) deals with abatement actions and the authority of the President to take

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<sup>110</sup>See CERCLA legislative history discussion *supra* note 61. Section 113(h) provides an incentive for federal facilities to conduct an expeditious and effective cleanup. It promotes expeditious cleanup actions by, in effect, clearing the way for the federal agency. Section 113(h) removes the hesitancy and second-guessing that may be present when trying to plan a remedy that will withstand legal challenge, and it actually prevents most legal challenges. Of course, if the remedial action is seriously deficient or in some way illegal, section 113(h) may allow a challenge under one of its exceptions. Section 113(h) promotes effective cleanup actions by allowing challenges after the remedial action, or a distinct and separable portion thereof, is complete -- the federal agency knows that it will still be "on the hook" if the remedial action is shown to be incomplete or otherwise inadequate.

<sup>111</sup>Manus, *Federalism under Siege*, *supra* note 18 at 342-43 (citing Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991)).

<sup>112</sup>*Id.* (Citing U.S. v. Colorado, 990 F.2d 1565, 1575-76 (10th Cir.1993), *cert. denied*, 144 S.Ct. 922 (1994)). Preemption is discussed further in Part IV.C., *infra*.

response action in addition to any state or local actions, when such additional action is warranted to abate the danger from an actual or threatened release.<sup>113</sup> At least one courts has fastened onto this provision as further support for arguments against any preemption of state or local law by CERCLA.<sup>114</sup> However, the language of the provision seems plain enough: the federal government can step in to abate a release or threatened release even when state or local authorities have (or are) also addressing the situation.<sup>115</sup> Rather than supporting concurrent jurisdiction, section 106(a) supports the authority of the federal lead agency to assert plenary control over a response action when that agency deems it "necessary to abate such danger or threat."<sup>116</sup>

Several courts have relied on the language of section 114(a)<sup>117</sup> to support a conclusion

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<sup>113</sup>42 U.S.C. §9606(a). This section reads as follows: "In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require."

<sup>114</sup>*See* Manus, *Federalism under Siege*, *supra* note 18 at 344 (citing *Attorney General v. Thomas Solvent Co.*, 380 N.W.2d 53, 59 (Mich.Ct.App.1985), *appeal denied*, 425 Mich. 880 (1986)).

<sup>115</sup>*Id.* at 345-348. Professor Manus seems to support that conclusion. He notes that section 106(a) does not resolve the issue of whether Congress intended concurrent jurisdiction for all levels of government at a hazardous waste site. He states that "[a] truly literal reading of section 106(a) is that the section simply points out that hazardous waste falls within the authority of all levels of government under some power or another, and that the fact that state or local authorities may have taken action at a facility does not preclude the federal government from addressing that facility." *Id.* The argument of this author is that this plain meaning interpretation of section 106(a) should be followed because it is logical. As explained below, pollution control at federal facilities requires a national program. Concurrent jurisdiction over cleanup efforts at federal facilities can only hinder the effectiveness of such a national program.

<sup>116</sup>*Id.* at 347. As Professor Manus notes, this interpretation of section 106(a) supports federal preemption when "necessary to abate such danger or threat." 42 U.S.C. §9606(a). It does not necessarily support a "full, permanent preemption of state law."

<sup>117</sup>42 U.S.C. §9614(a): "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."

that CERCLA did not preempt certain state cleanup actions or statutes.<sup>118</sup> However, as with section 106(a), a broad reading of section 114(a) as a savings clause prohibiting any preemption runs counter to the federal control set forth in section 104 and to the Congressional intent to create a national cleanup program. A narrower interpretation avoids such a conflict: section 114(a) can also be interpreted as allowing state action, but subject to the discretionary authority of EPA or the designated lead agency to exercise plenary control in order to achieve the goals of CERCLA.<sup>119</sup>

Similarly, a literal interpretation of section 302(d)<sup>120</sup> is that “no potentially liable party may use its CERCLA liability as a shield against meeting non-CERCLA responsibilities in

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<sup>118</sup>United States v. Colorado, 990 F.2d at 1576, 1580-81; Manor Care, Inc. v. Yaskin, 950 F.2d 122 (3d Cir.1991)(CERCLA did not preempt certain provisions of the New Jersey Spill Compensation and Control Act concerning the obligation of a responsible party to pay for the state's share of the cleanup costs at a CERCLA site.); Colorado v. Idarado Mining Co., 916 F.2d 1486, 1488 (10th Cir.1990), *cert. denied*, 499 U.S. 960 (1991)(“CERCLA §114(a) preserves the right of a state or other party to proceed under applicable state law to conduct a cleanup of a site affected by hazardous substances.”); see Manus, *Federalism under Siege*, *supra* note 18 at 344. As Professor Manus notes, the CERCLA preemption issue was complicated by *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986) and the Congress' reaction to that decision. The Supreme Court in that case found that CERCLA section 114(c), 42 U.S.C. §9614(c), preempted New Jersey's authority to tax a corporation to raise funds for the same purposes as CERCLA. However, in SARA, Congress repealed section 114(c). Two conflicting interpretations have emerged from those events. The Congressional repeal could be interpreted as an attempt to eliminate any preemptive language in CERCLA. However, that interpretation is unconvincing in light of the preemptive language left in sections 104, 121, and 122, as well as the overall intent in CERCLA, as noted above, for a national cleanup program. The *Exxon* decision and the Congressional reaction could also be used to argue that the Supreme Court did not consider the pre-SARA CERCLA statute to contain a general savings provision against at least some preemption of state actions. Manus, *Federalism under Siege*, *supra* note 18 at 329 n.9. The latter interpretation seems most reasonable, in light of the intent to create a national cleanup program through CERCLA and the preemptive language in sections 104, 121, and 122.

<sup>119</sup> Manus, *Federalism under Siege*, *supra* note 18 at 346.

<sup>120</sup>42 U.S.C. §9652(d): “Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.”

connection with a site.”<sup>121</sup> This does not diminish the authority of the EPA or designated lead agency from deciding that those non-CERCLA requirements should be satisfied through the CERCLA process.<sup>122</sup> However, a broad interpretation of 302(d), like that of the Tenth Circuit in *United States v. Colorado*, threatens to eclipse the permit exemption under 121(e) and the ARARs process under section 121(f), as well as the entire section 120.<sup>123</sup>

In *United States v. Colorado* the Tenth Circuit also relied on CERCLA section 120( i), which states that nothing shall impair the obligation of federal facilities to comply with RCRA, including RCRA corrective action requirements.<sup>124</sup> The court’s opinion also stated that NPL status has nothing to do with a federal facility’s obligation to comply with state hazardous waste laws, either those authorized by EPA through delegation of RCRA authority or state’s ability to enforce its own laws.<sup>125</sup> Section 120( i), however, has limited utility as support for the argument that CERCLA does not preempt federal or state requirements. This savings clause is limited to

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<sup>121</sup> Manus, *Federalism under Siege*, *supra* note 18 at 347.

<sup>122</sup> *Id.*

<sup>123</sup> Stubblebine, *United States v. Colorado*, *supra* note 91 at 104, n.15. Mr. Stubblebine argues that three reasons support a narrow reading of section 302(d). First, section 120( i) expressly refers to RCRA compliance. Second, the ARARs process under section 121 includes state laws. Third, section 120 deals with federal facilities only.

<sup>124</sup> 42 U.S.C. §9620( i): “Obligations under Solid Waste Disposal Act -- Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [42 U.S.C.A. s 6901 et seq.] (including corrective action requirements). See Robert L. Glicksman, *Pollution on the Federal Lands III: Regulation of Solid and Hazardous Waste Management*, 13 Stanford Envtl L.J. 3 (January 1994) at n.446 and accompanying text [hereinafter Glicksman, *Pollution on Federal Lands III*].

<sup>125</sup> 990 F.2d at 1578-80. This holding renders CERCLA section 120(a)(4), 42 U.S.C. §9620(a)(4), superfluous: “State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.” If NPL status is irrelevant to a federal facility’s obligation to comply with RCRA or state hazardous waste laws, then there is no reason to include a provision specifically addressing the obligations of non-NPL sites and omitting any reference to NPL sites.



section 120, and does not affect other provisions in CERCLA that preserve federal preeminence, such as sections 121(d)(2) and (d)(4) [reserving federal authority to select and waive ARARs], section 121(e) [permit waiver provision], and section 122(e)(6) [banning remedial actions not approved by the President].<sup>126</sup>

Arrayed against the non-preemption statements discussed above are the CERCLA provisions asserting federal authority over CERCLA cleanup actions. Section 104(a), discussed above, grants the President the authority to conduct removal and remedial actions as necessary to protect the public health or welfare or the environment. That section, standing alone, implies federal preemption in order to effectuate that statutory mandate.<sup>127</sup> CERCLA sections 121 and 122 also support a narrow interpretation of the CERCLA savings clauses and support federal preemption at CERCLA sites.

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<sup>126</sup> Manus, *Federalism under Siege*, *supra* note 18 at 343 n.80 (citing The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities, 54 Fed. Reg. 10,520, 10,526 (1989)(codified at 40 C.F.R. Part 300)). Professor Manus notes that “[c]ourts generally regard savings provisions that confine their applicability to the statutory section in which they appear as mere denials that anything in the section overrides or alters other statutory provisions.” *Id.* (citing *Milwaukee v. Illinois*, 451 U.S. 304, 328 (1981)). In its Listing Policy for Federal Facilities, EPA interpreted section 120(i) to mean that “section 120 does not impair otherwise applicable RCRA requirements.” 54 Fed. Reg. at 10,526. EPA explained that this mandate is met in CERCLA cleanups since CERCLA section 121(d)(2) provides that ARARs of RCRA and state law must be met. *Id.* Even if a RCRA or state law ARAR is waived under CERCLA section 121(d)(4), the state can obtain judicial review of that waiver pursuant to CERCLA section 121(f)(3). *Id.* The confusion surrounding CERCLA preemption might be cleared up somewhat if subsection 120(i) were omitted. Indeed, but for subsection 120(i), section 120 would support an argument for preemption.

<sup>127</sup> See Manus, *Federalism under Siege*, *supra* note 18 at 348-372. Implied preemption is supported by the sweeping scope of CERCLA as evinced by the Congressional intent to fashion a national program to respond to abandoned and inactive hazardous waste sites. *Supra* note 61. Even CERCLA’s title, starting with the word “Comprehensive”, indicates a Congressional intent to occupy the field. Manus, *Federalism under Siege*, *supra* note 18 at 352 (citing *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) in which the Supreme Court determined that the Federal Water Pollution Control Act preempted federal common law based in part on its finding that Congress “occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency”).

CERCLA section 121(e)(2)<sup>128</sup> authorizes States to enforce any federal or state standard or requirement to which the remedial action must conform under CERCLA. There are two ways to interpret this section. First, the section could be read as allowing states to enforce their own standards under RCRA (since CERCLA section 120( i) states that nothing in CERCLA shall affect or impair the obligation of the federal agency to comply with RCRA). The former interpretation is inconsistent with section 113(h) and with the overall purpose of CERCLA because, if followed to its logical conclusion, would enable states to control cleanup. The EPA approach to state enforcement under CERCLA section 121(e)(2) has been to involve states in the process and as signatories to the IAG.<sup>129</sup> That approach works well when the state is willing to negotiate. But if not, this first interpretation provides no basis for the EPA or the lead agency to preempt the state and conduct the cleanup.

Alternatively, section 121(e)(2) could also be interpreted as allowing states to enforce their own requirements when the remedial action violates CERCLA procedural or substantive requirements. This second interpretation is consistent with section 113(h) as well as the overall purpose of CERCLA to conduct cleanups expeditiously (but also to conduct cleanups in a

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<sup>128</sup>42 U.S.C. §9621(e)(2): "A State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located. Any consent decree shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate Federal and State agencies. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed \$25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree."

<sup>129</sup>See EPA Memorandum dated January 25, 1988 (concerning enforcement actions at federal facilities), *supra* note 13.

manner consistent with CERCLA and the NCP). CERCLA section 121(f)<sup>130</sup> deals with state involvement, but subjects that involvement to federal control. As the court noted in *Colorado v. Idarado Mining Co.*,<sup>131</sup> the broader interpretation of section 121(e)(2) would render section 121(f) irrelevant.

CERCLA section 122(e)(6)<sup>132</sup> supports a narrow reading of the savings clauses in CERCLA in that it requires federal authorization of any remedial action by any PRP once a CERCLA remedial investigation has begun at a site.<sup>133</sup> In *United States v. Colorado*, EPA argued that this section gives EPA decision-making authority over remedy selection when there are conflicts between EPA and a RCRA-authorized state. The Tenth Circuit rejected this argument, reasoning that 122(e)(6) did not apply to federal facilities since it addresses "private" responsible parties.<sup>134</sup>

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<sup>130</sup>42 U.S.C. §9621(f). State involvement is subject to federal control. For example, under section 121(f)(1), the President promulgates the regulations governing state involvement. Under section 121(f)(2)(C), the President is able to conclude settlement negotiations with potentially responsible parties without State concurrence. Under section 121(f)(3)(C), Congress emphasized that "[n]othing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such [State] standard, requirement, criteria, or limitation."

<sup>131</sup>916 F.2d at 1494-96.

<sup>132</sup>42 U.S.C. §9622(e)(6): "When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President."

<sup>133</sup>Manus, *Federalism under Siege*, *supra* note 18 at 348.

<sup>134</sup>Stubblebine, *United States v. Colorado*, *supra* note 91 at 104; Manus, *Federalism under Siege*, *supra* note 18 at 343 n.80. The Tenth Circuit's argument seems a bit strained here since CERCLA section 122(e)(6) refers to "potentially responsible party" and does not limit that term to private entities.

## 5. ARARs

ARARs are another important issue in the landscape regarding federal authority at CERCLA sites.<sup>135</sup> Pursuant to CERCLA section 121(a), the President selects the appropriate remedial actions, in accordance with section 121, the NCP, and cost-effectiveness. The remedial action selection must consider at least the factors listed in section 121(b), and the cleanup standards selected are governed by section 121(d). This forms the statutory basis for the ARARs concept under CERCLA. In a nutshell, "applicable requirements" are directly applicable state or federal legal requirements, while "relevant and appropriate requirements" may be relevant to the cleanup action, but are not specifically required.<sup>136</sup>

ARARs are important to the issue of RCRA/CERCLA overlap at federal facilities for two reasons. First, the lead agency under CERCLA identifies the ARARs.<sup>137</sup> Second, it is reasonable to conclude, based on the statutory and regulatory structure of CERCLA, that the ARARs process was designed to provide "the sole vehicle for state involvement."<sup>138</sup> Under CERCLA, an ARAR is essentially a requirement. A "requirement" is generally defined in environmental law

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<sup>135</sup>ARARs stands for "applicable or relevant and appropriate requirements". EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, CERCLA COMPLIANCE WITH OTHER LAWS MANUAL -- OVERVIEW OF ARARs, Publication 9234.2-03/FS (December 1989)(reprinted in Bernard K. Schafer, *1995 CERCLA Handbook* 277 [unpublished]). The NCP defines "applicable requirements" and "relevant and appropriate requirements" separately in 40 C.F.R. §300.5.

<sup>136</sup>40 C.F.R. §§300.5, 300.400(g)(2); see *Tug-of-War*, *supra* note 73 at f.n.86. A lead agency has the authority to waive ARARs for on-site actions pursuant to CERCLA section 121(d)(4). Private parties can waive relevant and appropriate requirements, but not applicable requirements. *Tug-of-War*, *supra* note 73 at f.n.86 (citing 40 C.F.R. §§300.400-.425; 55 Fed. Reg. 8666, 8796, 8841, 8850 (1990)).

<sup>137</sup>40 C.F.R. §300.400(g).

<sup>138</sup>*Stubblebine, Colorado v. United States*, *supra* note 91 at 107 n.8; Manus, *Federalism under Siege*, *supra* note 18 at 356 (quoting *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1495 (10th Cir.1990) in which the court interpreted CERCLA section 121 as "unquestionably envisioning a remedial action selected by the federal government or its delegates" and concluding that independent state action would "render these provisions irrelevant" and "defeat the intended scope of state involvement".)

as a "term of art describing substantive -- not procedural -- standards."<sup>139</sup> The court in *Ohio v. EPA*<sup>140</sup> upheld the NCP definition of ARARs as substantive requirements (and as not including procedural requirements). Thus, a federal agency, acting as lead agency at a CERCLA site, normally is to incorporate as ARARs the substantive requirements of RCRA or appropriate state law without being bound by any of the procedural requirements of RCRA or state law.

Several other provisions in CERCLA define the scope of ARARs in cleanup actions. States are precluded from suing using state laws that are ARARs, under CERCLA section 113(h).<sup>141</sup> Under CERCLA section 120(f), a state is afforded the opportunity to review and comment. Pursuant to CERCLA section 121, state involvement in the cleanup action is subject to the regulations promulgated by the President and to the ARARs selected by the lead agency. The lead agency, as mentioned above, can waive state law ARARs, under CERCLA section 121(f). When CERCLA was enacted in 1980, Congress had experience with writing legislation delegating federal authority to enforce EPA programs to the states and subjecting federal agencies to state and local as well as federal requirements. This was not done in CERCLA. Finally, CERCLA section 121 is rendered superfluous if a "remediation effort must comply with all requirements of an EPA-approved state program, regardless of ARAR status".<sup>142</sup>

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<sup>139</sup>Stubblebine, *Colorado v. United States*, *supra* note 91 at 105.

<sup>140</sup> 997 F.2d at 1526-27.

<sup>141</sup>Stubblebine, *Colorado v. United States*, *supra* note 91 at 103.

<sup>142</sup>Stubblebine, *Colorado v. United States*, *supra* note 91 at 103, 107 n.8. CERCLA section 121(f)(3) allows a state to challenge a federal agency's remedial plan that does not meet an ARAR. 42 U.S.C. §9621(f)(3). If the state establishes, based on the administrative record, that the selection of the remedial plan was not supported by "substantial evidence", then the remedial plan must be modified to conform to the ARAR at issue. However, the state challenge must involve the nonattainment of an ARAR -- it cannot challenge remedial action unrelated to an ARAR. 42 U.S.C. §9621(f)(3)(C).

## 6. Pros and Cons to CERCLA Cleanups at DoD Facilities

For a DoD facility, there are advantages and disadvantages to conducting a cleanup action under CERCLA.<sup>143</sup> While it is the position of this author that the advantages outweigh the disadvantages, there may be unique circumstances at a particular site that favor proceeding under RCRA Corrective Action instead of CERCLA. The purpose of this paper is not to advocate CERCLA over RCRA as a framework for a cleanup action. Rather, the central theme is that, at a CERCLA site located on a DoD facility, DoD as the lead agency is delegated the authority to select the regulatory framework under which the cleanup will proceed.

Essentially, a federal agency designated as lead agency under CERCLA stands in the shoes of EPA relative to the implementation of that cleanup effort.<sup>144</sup> Of course, EPA still possesses enforcement authority under federal environmental statutes and may function as support agency to DoD under the NCP.<sup>145</sup> For federal facilities, at least eight advantages accrue from proceeding under CERCLA.

- First, federal, state, or local permits are not required for on-site response actions

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<sup>143</sup>See Bernard Schafer, *USAF Authority Under CERCLA and other Environmental Laws, and the Integration of RCRA Corrective Action into CERCLA and the IRP/DERA Program*, USAF Judge Advocate General's School Environmental Law Update Course (1993); *Tug of War*, *supra* note 73 at 382-394, 405-406.

<sup>144</sup>See Executive Order No. 12580, *supra* note 79 and accompanying text. Under that delegation, DoD is granted extensive authority to respond to releases on or from a DoD facility, subject only to Sections 2(a), (b), and (c) of the Executive Order. That condition does not detract significantly from the authority delegated to DoD. *Supra* note 80. The delegation to DoD, as described *supra* note 79, includes removal and remedial action authority under CERCLA §104(a); authority to investigate, coordinate investigations, and monitor releases; authority to select the remedial action; authority to establish an administrative record to serve as a basis for the selection of the remedial action and to establish procedures for public participation in the process; responsibility to provide notice and comment procedures, and to explain any differences between the final plan and actual actions taken; authority to indemnify response action contractors; and authority to select the applicable or relevant and appropriate requirements upon which the remedial action is based. The NCP states that DoD is responsible for taking *all action necessary* with respect to releases on or from a DoD facility. 40 C.F.R. §300.175(b)(4).

<sup>145</sup>40 C.F.R. §300.5. The support agency "provide[s] the support agency coordinator [SAC] to furnish necessary data to the lead agency, review response data and documents, and provide other assistance as requested by the OSC or RPM." *Id.*

conducted pursuant to CERCLA 104, 106, 120, 121, or 122.<sup>146</sup>

- ▶ Second, the President has delegated lead agency authority to DoD and DoE for releases on or from a facility or vessel under their control. The lead agency has the authority to identify and waive ARARs.<sup>147</sup>
- ▶ Third, judicial review -- and therefore the potential for delay -- of the cleanup action is limited. Generally, under CERCLA section 113(h), the cleanup action is shielded from judicial review until after it is complete. Under CERCLA section 113(j), judicial review is limited to the administrative record, and the standard of review is whether the agency action is arbitrary and capricious.
- ▶ Fourth, administrative ARARs need not be followed for "on-site" cleanups.<sup>148</sup>
- ▶ Fifth, the lead agency has the authority to order disclosure of information, to order entry to a vessel or facility or property, and to order an inspection and the taking of samples.<sup>149</sup>
- ▶ Sixth, under CERCLA there is a reduced risk of exposure to state and local penalties, since the waiver of sovereign immunity under FFCA covers RCRA, but not CERCLA.
- ▶ Seventh, CERCLA is broader in scope than RCRA corrective action in that CERCLA hazardous substances include substances like radionuclides that are not RCRA hazardous

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<sup>146</sup> 42 U.S.C. §9621(e); 40 C.F.R. §300.400(e)(1). "On-site" is defined in the regulations as "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." *Id.* The vagueness of the terms "suitable" and "very close proximity" and "necessary for implementation" make this a flexible definition that is easily satisfied. Permits are required for off-site response actions, such as off-site treatment, storage, or disposal of hazardous waste from the response action. 40 C.F.R. §300.400(e)(2).

<sup>147</sup> CERCLA section 121(d)(4); 40 C.F.R. §300.400(g).

<sup>148</sup> National Oil and Hazardous Substances Pollution Contingency Plan (Final Rule), 55 Fed. Reg. 8666, 8756 (1990) (codified at 40 C.F.R. §300.5); National Oil and Hazardous Substances Pollution Contingency Plan (Proposed Rule), 53 Fed. Reg. 51394, 51443 (1988).

<sup>149</sup> CERCLA section 104(e), 42 U.S.C. §9604(e); 40 C.F.R. §300.400(d). This authority to order entry includes access to contaminated areas outside the facility boundaries. 40 C.F.R. §300.400(d).

constituents.<sup>150</sup> Depending on the types of contaminants present at a site, this may allow the federal agency to address all the contamination under a single statutory scheme.

- ▶ Eighth, if a site is not on the NPL, the lead agency is able to select the remedy.<sup>151</sup>

Of course, there are also disadvantages to proceeding under CERCLA.

- ▶ The complex and time-consuming CERCLA process may be required at relatively minor sites. The time and resources expended complying with the entire process may not be commensurate with the benefits gained from cleaning a minor site.<sup>152</sup>
- ▶ Under CERCLA, liability must be determined in some federal facility cleanup actions. This determination often requires a significant effort involving testing, sampling, administrative searches, and legal wrangling. For federal facilities, however, liability of other parties is only an issue when contamination migrates beyond the installation boundaries and commingles with contamination from other sources; when the source is

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<sup>150</sup>EPA Memorandum on Enforcement Actions at Federal Facilities under RCRA and CERCLA, January 25, 1988 (reprinted in Robert E. Steinberg & Richard H. Mays, 4 RCRA and Superfund: A Practice Guide with Forms, Chap 65 (1994) [Volume 1 cited *supra* note 6]).

<sup>151</sup>Executive Order No. 12580, *supra* note 79 at Section 2(d) & (e); see Manus, *Federalism under Siege*, *supra* note 18 at n.216 (noting that under Exec. Order No. 12580 “the polluting agencies may select removal actions and perform the remedial investigation.”). This conflicts with CERCLA section 120(a)(4), applying state law to removal and remedial actions on non-NPL federal facilities. Exec. Order No. 12580 Section 2(d) delegates the President’s authority under CERCLA section 104(c)(4) [Selection of Remedial Action] to DoD with respect to releases on or from facilities within DoD’s jurisdiction. Section 2(e) delegates the same authority to the heads of Executive departments and agencies for non-NPL releases or non-emergency releases. Section 2(d) stipulates that the delegated functions must be exercised in a manner consistent with the requirements of CERCLA section 120. Section 2(e) of Exec. Order No. 12580 does not contain such a stipulation. This conflict should be resolved by allowing the federal lead agency to select the remedial action at a non-NPL site. Allowing state law to control conflicts with the comprehensive federal structure established by CERCLA; it conflicts with CERCLA section 121, restricting state participation to the ARARs process (as discussed *supra* note 136 and accompanying text); and it renders the delegations of authority in Exec. Order No. 12580 Sections 2(d) & (e) irrelevant for non-NPL sites. Allowing state law to control removal and remedial actions at federal non-NPL sites would subject the majority of DoD cleanup sites to state law. *Supra* note 10 (the majority of DoD cleanup sites are not on the NPL).

<sup>152</sup>GAO, HIGH PRIORITY SITES, *supra* note 8 at 10-11. CERCLA section 120(e) allows some flexibility in order to expedite cleanup. Also, President Clinton’s “Fast Track Cleanup” initiative, announced in July 1993, may also allow circumvention of certain procedural CERCLA requirements.



a private entity that was permitted to use federal facilities; when contamination from another source migrates onto the installation; when a contractor operates a government-owned facility and there is a dispute as to whether the contractor is responsible for the contamination; or when a new owner of a formerly used installation files a claim for cleanup after the property has been transferred.<sup>153</sup>

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<sup>153</sup>*Id.* at 21-22.

## B. RCRA

### 1. Purpose and Congressional Intent

The Resource Conservation and Recovery Act (RCRA)<sup>154</sup> provides a program for the "cradle-to-grave" management of hazardous waste.<sup>155</sup> RCRA applies to owners and operators who generate, transport, treat, store, or dispose of hazardous waste or hazardous waste constituents.<sup>156</sup> It applies to active treatment, storage, or disposal facilities (TSDFs), and to TSDFs closed after November 19, 1980.<sup>157</sup> For active TSDFs, RCRA imposes permit requirements, and the permit must address corrective action measures. The purpose of RCRA is to regulate the treatment, storage, and disposal (TSD) of hazardous waste through a permit system.<sup>158</sup> It is generally a prospective program in that it applies only to active TSDFs and TSDFs that closed after November 19, 1980.<sup>159</sup> RCRA applies to solid and hazardous wastes.<sup>160</sup> "Waste" is defined broadly in the RCRA universe.<sup>161</sup> A waste is "hazardous" if, "because of its quantity, concentration, or physical, chemical, or infectious characteristics [it] may -- (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or

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<sup>154</sup>42 U.S.C. §6901.

<sup>155</sup>*Tug-of-War*, *supra* note 73 at 362-63 (quoting *United Technologies Corp. v. EPA*, 821 F.2d 714, 716 (D.C. Cir.1987)).

<sup>156</sup>*Id.* at 363; 40 C.F.R. Parts 262-268.

<sup>157</sup>*Tug-of-War*, *supra* note 73 at 364; 40 C.F.R. §270.1(b) & (c).

<sup>158</sup>*United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1269 (3d Cir.1993), *reh'g, en banc, denied*, 1993 U.S. App. LEXIS 27769 (3d Cir., October 22, 1993).

<sup>159</sup>*Id.*

<sup>160</sup>*See* Darmody, *Hazardous Waste Law*, *supra* note 24, 160.

<sup>161</sup>42 U.S.C. 6903(27); *see also* *Owen Elec. Steel Co. of South Carolina, Inc. v. Browner*, 37 F.3d 146, 148 n.3 (4th Cir.1994)(discussion of the relationship between this definition and 40 C.F.R. § 261.2 and Subtitle C.)

incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.”<sup>162</sup> RCRA requirements apply to those who generate, transport, treat, store, or dispose of hazardous waste.<sup>163</sup>

RCRA Corrective Action applies to TSDFs in operation since November 19, 1980, handling solid and hazardous waste,<sup>164</sup> and which have not completed RCRA closure before January 26, 1983.<sup>165</sup> RCRA permits for TSDFs issued after November 8, 1984, must require the permittee to take corrective action “for all releases of hazardous waste or hazardous constituents from any solid waste management unit” located at the permitted facility “regardless of the time at which waste was placed in the unit.”<sup>166</sup> The RCRA corrective action program applies to every facility required to have a RCRA permit.<sup>167</sup>

The purpose of the Congress in enacting the RCRA Corrective Action program seems

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<sup>162</sup>42 U.S.C. §6903(5).

<sup>163</sup>42 U.S.C. §§6922-6925; *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1590 (1994); *see generally* *Owen Elec. Steel Co. of South Carolina, Inc. v. Browner*, 37 F.3d 146 (4th Cir.1994); Darmody, *Hazardous Waste Law*, *supra* note 24, 160; 40 C.F.R. §§260.10 (defining the terms “disposal”, “generator”, “storage”, “transportation”, “transporter”, and “treatment”).

<sup>164</sup>40 C.F.R. §260.10 states that “[h]azardous waste means a hazardous waste as defined in [40 C.F.R. §] 261.3.”

<sup>165</sup>Richard G. Stoll, *RCRA versus CERCLA -- Choice and Overlap*, C778 ALI-ABA 141 (1992); 40 C.F.R. §270.1(c).

<sup>166</sup>*Rohm & Haas Co.*, 2 F.3d at 1269-70.

<sup>167</sup>*Id.* at 1270. In addition, past and on-going RCRA violations are subject to citizen suits. 42 U.S.C. §6972; *see Werlein v. United States*, 746 F.Supp. 887, 896 (D.Minn.1990), *vacated by* 793 F.Supp. 898 (D.Minn.1992)(claim was dismissed. Pursuant to a settlement agreement, the United States moved to vacate the earlier ruling which certified the class action for challenges. The United States also moved to dismiss the class action claims without prejudice. Thus, the court concluded that the dispute over the CERCLA section 113(h) issue was mooted by the settlement.). The EPA Administrator is also authorized to bring a suit in federal court to order appropriate persons to take the necessary corrective action in response to an imminent hazard from the storage, treatment, or disposal of solid or hazardous waste. 42 U.S.C. §6973.

to have been twofold. One purpose was "to prevent RCRA sites from becoming future burdens on the Superfund program."<sup>168</sup> The intent of Congress was to avoid shifting responsibility for control of such releases from the facility owner/operator to Superfund, especially when a facility is requesting a final permit.<sup>169</sup> However, it is important to note that this intent does not support application of RCRA corrective action requirements to federal facilities since Superfund does not finance cleanups at federal facilities. A second purpose was "to assure that appropriate corrective action is taken to protect human health and the environment from any past, present or future release of hazardous waste from a permitted hazardous waste facility."<sup>170</sup>

## 2. Expanding Scope of RCRA Corrective Action

The scope of corrective action expanded from the pre-1984 regulations to present regulations. The pre-1984 RCRA corrective action requirements applied to on-site releases of hazardous waste from permitted TSDFs that received hazardous waste after July 26, 1982.<sup>171</sup>

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<sup>168</sup>Hazardous Waste Management System; Final Codification Rule, 50 Fed. Reg. 28,702, 28,713 (1985) (citing H.R. Rep. No. 198, 98th Cong., 1st Sess., part 1, 61 (1983)).

<sup>169</sup>Pub. L. No. 98-616, 1984 U.S.C.C.A.N. 5620. RCRA sect 3004(u) is covered in section 206 of Pub.L. 98-616, RCRA section 3004(v) is covered in section 207, RCRA section 3008(h) is covered in section 233(a). 1984 U.S.C.C.A.N. 5576; *see also*, Pub. L. No. 102-386, 1992 U.S.C.C.A.N. 1287. In House Report No. 98-198, the Committee on Energy and Commerce explained that a key purpose of Pub. L. 98-616 was to amend and modify the Solid Waste Disposal Act (a.k.a. RCRA) "to assure adequate protection of public health and the environment." 1984 U.S.C.C.A.N. 5576. The House Report explained that Pub. L. 98-616 was needed because the experience with Subtitle C, hazardous waste management system, demonstrated that "the task of comprehensive hazardous waste management is one of unparalleled scope and complexity." *Id.* at 5578. The Committee concluded that the hazardous waste management system under RCRA "must be conducted in a manner that controls and prevents present and potential endangerment to public health and the environment." *Id.* at 5579. If not, the system will merely contribute to future burdens on the CERCLA system. *Id.*

<sup>170</sup>50 Fed. Reg. at 28,713 (quoting S. Rep. No. 284, 98th Cong., 1st Sess., 31 (1983)).

<sup>171</sup>*Tug-of-War*, *supra* note 73 at 365-66. Initially, the corrective action regulations were not effective until January 26, 1983, six months after the regulations were promulgated. However, many TSDFs stopped receiving hazardous wastes before January 26, 1983, in order to avoid the corrective action requirements. In order to close this loophole, Congress amended RCRA to make the corrective action requirements applicable after July 26, 1982. *Id.* (continued...)

However, the 1984 amendments greatly expanded the scope of RCRA corrective action requirements by including prior releases under RCRA section 3004. Thus, the House Report noted that the [RCRA section 3004] amendment applies corrective action requirements "to all solid waste management units at a facility requesting a permit for any one of those units, irrespective of whether waste was placed in the unit prior to January 26, 1983. The Committee does not, however, intend EPA to require cleanup from areas where wastes were not placed in management units except where releases from these other areas are indistinguishable from releases from management units."<sup>172</sup> The intent seems to have been to cover all units at a facility, whether or not the units were currently active. According to the legislative history, the purpose of the amendment was "to ensure that all facilities which seek a permit under [RCRA section] 3005(e) control and cleanup all releases of all hazardous constituents from all solid waste management units at the time of permitting the facility."<sup>173</sup> By expanding the scope of corrective action to include releases from any location containing hazardous substances at the facility seeking a RCRA permit, Congress set the stage for conflicts with CERCLA.<sup>174</sup>

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<sup>171</sup>(...continued)  
at n.36.

<sup>172</sup>Pub. L. No. 98-616, 1984 U.S.C.C.A.N. 5619.

<sup>173</sup>Pub. L. No. 98-616, 1984 U.S.C.C.A.N. 5619. The term "unit" was explained as being defined in the preamble to EPA regulations published on July 26, 1982, and as further defined by EPA in future. *Id.* at 5619. "Units" identified in that preamble included "containers, tanks, surface impoundments, waste piles, land treatment units, landfills, incinerators, and underground injection wells." 50 Fed. Reg. at 28,712 (citing 47 Fed. Reg. 32,281 (July 26, 1982)). The term "Solid Waste Management Unit" (SWMU) was used to reaffirm EPA's responsibility to examine all units at the facility from which hazardous constituents might migrate, whether or not the units were intended for the management of solid or hazardous wastes. "Hazardous constituents" were defined as those listed in RCRA, App VIII. *Id.* at 5619-20.

<sup>174</sup>RCRA section 7003, 42 U.S.C. §6973, also lends support to a RCRA challenge to CERCLA authority. That section sets up the "Imminent Hazard Program". It authorizes EPA to bring suit to force responsible parties to take corrective action if solid or hazardous waste presents an "imminent and substantial endangerment to health or the environment." EPA can issue administrative orders as necessary. *Rohm & Haas Co.*, 2 F.3d at 1269.

The corrective action program is outlined in three sections of RCRA. RCRA §3004(u) requires corrective action for all releases from Solid Waste Management Units (SWMUs). RCRA permits issued after November 8, 1984, must require such corrective action for all continuing releases on or off the site,<sup>175</sup> regardless of when the wastes were placed in the SWMU. RCRA §3004(v) requires corrective action beyond the facility boundary when necessary to protect human health and the environment, unless the owner/operator of the facility can justify not taking such action. RCRA §3008(h) authorizes the EPA Administrator to order corrective action when he learns of a release from an interim status unit.<sup>176</sup>

RCRA section 3004(u)<sup>177</sup> addresses continuing releases at permitted facilities. As noted in the legislative history discussion above, the scope of coverage of RCRA corrective action is broad. RCRA section 3004(u) requires corrective action for all releases of hazardous constituents (defined in 40 C.F.R. Part 261, App. 8) from SWMUs. RCRA permits issued after November 8, 1984, must require such corrective action for all continuing releases on or off the

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<sup>175</sup>EPA regulations define "on-site" broadly: "On-site means the same or geographically contiguous property which may be divided by public or private right-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property." 40 C.F.R. §260.10.

<sup>176</sup>Two other applications of corrective action requirements should be mentioned here. RCRA section 9003(h), 42 U.S.C. §6991b(h), requires corrective action for releases from underground storage tanks. Also, corrective action is required for releases of hazardous constituents from landfills. 40 C.F.R. § 258.58. Corrective action for landfills involves groundwater monitoring and is based on the corrective measures assessment conducted under 40 C.F.R. §258.56, and the remedy selection, conducted under 40 C.F.R. §258.57.

<sup>177</sup>42 U.S.C. §6924(u): "Continuing releases at permitted facilities. Standards promulgated under this section shall require, and a permit issued after the date of enactment of the Hazardous and Solid Waste Amendments of 1984 [Nov. 8, 1984] by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subtitle [42 USCS §§ 6921 et seq.], regardless of the time at which waste was placed in such unit. Permits issued under section 3005 [42 USCS § 6925] shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action."

site, regardless of when the wastes were placed in the SWMU.

Some terms should be explained at this point. The term "SWMU" is not defined in the statute or regulations.<sup>178</sup> However, EPA goes back to the legislative history for its working definition: "any unit at the facility 'from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes.'"<sup>179</sup> This is a broad definition. The EPA explanation limits an SWMU somewhat. The term "is generally not intended to encompass areas where wastes were not placed in such units."<sup>180</sup> The term "unit", continues EPA, "at least encompasses the units identified in [the preamble to EPA regulations published on July 26, 1982], which refers to 'containers, tanks, surface impoundments, waste piles, land treatment units, landfills, incinerators, and underground injection wells.'"<sup>181</sup> Also, it seems that the SWMU definition was intended to limit EPA

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<sup>178</sup>However, the term "solid waste management facility" is defined in RCRA section 1004(29) as including "(A) any resource recovery system or component thereof, (B) any system, program, or facility for resource conservation, and (c) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise." 42 U.S.C. §6903(29). To further confuse matters, a slightly different term is used in RCRA section 3004(u): "solid waste management unit". As one court explained: "[T]he term 'solid waste management unit' is used to reaffirm the Administrator's responsibility to examine all units at [a TSDF] from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous waste." *Owen Elec. Steel Co. of South Carolina, Inc. v. Browner*, 37 F.3d 146, 148 (4th Cir.1994)(quoting H.R.Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 60 (1983), reprinted in 1984 U.S.C.C.A.N. 5576, 5619).

<sup>179</sup>50 Fed. Reg. 28702, 28712 (citing H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983)). As discussed in the CERCLA section at page 25, the geographic boundaries of a CERCLA site are determined by the areal extent of the contamination from the release. RCRA corrective action is much more far-reaching. Basically, the existence of a permitted TSDF subjects all contiguous property under the control of the TSDF owner/operator to RCRA section 3004(u) requirements. 40 C.F.R. §260.10; 50 Fed. Reg. at 28,712. "Hazardous waste constituent" is defined as "a constituent that caused the Administrator to list the hazardous waste in part 261, subpart D, of this chapter, or a constituent listed in table 1 of §261.24 of this chapter." 40 C.F.R. §260.10.

<sup>180</sup>50 Fed. Reg. at 28,712.

<sup>181</sup>*Id.* (citing 47 Fed. Reg. 32,281 (July 26, 1982)).

jurisdiction under RCRA section 3004(u) to "discernible units".<sup>182</sup> Thus, a spill or release from a "discernible unit" would be subject to RCRA corrective action. However, RCRA section 3004(u) would not apply to a spill or release that cannot be linked to a SWMU.<sup>183</sup>

RCRA also uses the term "hazardous waste management unit".<sup>184</sup> At least one court has used this as a working definition of a SWMU.<sup>185</sup> Similarly, the term "disposal" in RCRA, analogous to a "release" under CERCLA, is given a broad definition: "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground

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<sup>182</sup>The EPA regulations also define the term "miscellaneous unit" as "a hazardous waste management unit where hazardous waste is treated, stored, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under 40 CFR part 146, containment building, corrective action management unit, or unit eligible for research, development, and demonstration permit under §270.65." 40 C.F.R. §260.10.

<sup>183</sup>50 Fed. Reg. at 28,712; Stoll, *RCRA versus CERCLA*, *supra* note 51, 165 at 155 (citing Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,808-09 (1990) (to be codified at 40 C.F.R. Parts 264, 265, 270, and 271). However, EPA notes that a one-time spill of solid or hazardous waste (such as from a truck travelling through a facility) occurring after November 19, 1980, might be actionable under section 3004(u) because it would constitute an illegal disposal. 50 Fed. Reg. at 28712-13.

<sup>184</sup>40 C.F.R. §260.10: "Hazardous waste management unit is a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area. Examples of hazardous waste management units include a surface impoundment, a waste pile, a land treatment area, a landfill cell, an incinerator, a tank and its associated piping and underlying containment system and a container storage area. A container alone does not constitute a unit; the unit includes containers and the land or pad upon which they are placed." Yet another designation, "areas of concern" (AOCs), has been used by some EPA regions under RCRA section 3005(c)(3) [permit issuance for treatment, storage, or disposal of hazardous waste] to designate areas subject to RCRA corrective action. Stoll, *RCRA versus CERCLA*, *supra* note 51, 165 at 157-160. This usage is limited, however, in that EPA requires a showing of necessity to protect human health and the environment before it will impose permit conditions under RCRA section 3005(c)(3). *Id.* at 159-160 (citing 56 Fed. Reg. 7145, n.8 (1991)).

<sup>185</sup>*National-Standard Co. v. Adamkus*, 685 F.Supp. 1040, 1042 n.3 (E.D.Ill.1988), *aff'd*, 881 F.2d 352 (7th Cir.1989)(cited in Daniel Horne, Casenote, *Federal Facility Environmental Compliance after United States Department of Energy v. Ohio*, 65 U.Colo.L.Rev. 631 at f.n.46 (1994)).



waters.”<sup>186</sup>

The regulatory definitions and EPA explanations in the Federal Register, arguably, can be used to extend RCRA section 3004(u) authority to any spill or release, thereby eclipsing CERCLA. Thus, it is possible to argue that the only situation in which RCRA corrective action requirements would not apply is when the contaminants involved fall outside the definition of a “solid or hazardous waste or any constituent thereof”.<sup>187</sup>

Two definitions were added to the RCRA Corrective Action nomenclature in 1993 that deserve to be mentioned because of the flexibility they add to the corrective action process. CAMUs (Corrective Action Management Units)<sup>188</sup> and TUs (Temporary Units)<sup>189</sup> are areas designated by the EPA Regional Administrator within a facility for the management of “remediation wastes”.<sup>190</sup> A “corrective action management unit” (CAMU) is defined as “an area within a facility”<sup>191</sup> that is designated by the Regional Administrator under 40 C.F.R. part 264

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<sup>186</sup>42 U.S.C. §6903(3).

<sup>187</sup>*Id.*

<sup>188</sup>A corrective action management unit is defined in 40 C.F.R. §260.10. The procedures for designating and using CAMUs are set out in 40 C.F.R. §264.552. EPA expects the substantive requirements for CAMUs and TUs to be ARARs for many CERCLA sites, especially sites involving the management of RCRA hazardous wastes. EPA also expects the increased flexibility of CAMUs and TUs to expedite remedies at CERCLA sites, including “remediation under CERCLA of RCRA hazardous wastes at Federal facilities that are listed on the National Priorities List.” Corrective Action Management Units and Temporary Units; Corrective Action Provisions Under Subtitle C, 58 Fed. Reg. 8658, 8679 (1993) (codified at 40 C.F.R. Parts 260, 264, 265, 268, 270, and 271).

<sup>189</sup>40 C.F.R. §264.553.

<sup>190</sup>40 C.F.R. §260.10: “Remediation waste means all solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §264.101 and RCRA section 3008(h). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing RCRA sections 3004(v) or 3008(h) for releases beyond the facility boundary.”

<sup>191</sup>Navigation back and forth between the alternate universes of RCRA and CERCLA requires a knowledge of definitions (or at least the awareness of the need to check the definitions). In RCRA corrective action, “facility” is  
(continued...)

subpart S, for the purpose of implementing corrective action requirements under 40 C.F.R. §264.101 and RCRA section 3008(h). A CAMU shall only be used for the management of remediation wastes pursuant to implementing such corrective action requirements at the facility.”<sup>192</sup> EPA explained that the CAMU was created to provide “remedial decision makers with an added measure of flexibility in order to expedite and improve remedial decisions.”<sup>193</sup>

The EPA Regional Administrator may also designate a temporary treatment or storage unit as a TU. The unit must be used for treatment or storage of hazardous remediation wastes during remedial activities required under 40 C.F.R. §264.101 or RCRA section 3008(h). The TU is governed by “alternative” design, operating, or closure requirements (which still must be “protective of human health and the environment”).<sup>194</sup>

RCRA §3004(v)<sup>195</sup> requires corrective action beyond the facility<sup>196</sup> boundary when

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<sup>191</sup>(...continued)

defined as: “ (1) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them). (2) For the purpose of implementing corrective action under §264.101, all contiguous property under the control of the owner or operator seeking a permit under subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h).” 40 C.F.R. §260.10. It is important to note that under this definition a “‘facility’ is not limited to those portions of the owner's property at which units for the management of solid or hazardous waste are located.” 50 Fed. Reg. 28702, 28712. In the CERCLA universe, however, a facility is defined as “any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” 42 U.S.C. §9601(9); *supra* at page 25. One is reminded of Humpty Dumpty in Lewis Carroll's *Through the Looking Glass*, who scolded Alice: “When I use a word,... it means just what I choose it to mean -- neither more nor less.” LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 136 (in *THE COMPLETE ILLUSTRATED WORKS OF LEWIS CARROLL*, edited by Edward Guiliano, Avenel Books, New York, 1982).

<sup>192</sup> 40 C.F.R. §260.10.

<sup>193</sup> 58 Fed. Reg. 8658. However, EPA cautioned that, despite this flexibility, “other existing requirements, policies, and guidelines for establishing site-specific cleanup goals and for selecting remedies remain in effect.” *Id.*

<sup>194</sup> 40 C.F.R. §264.553.

<sup>195</sup> 42 U.S.C. §6924(v): “Corrective actions beyond facility boundary. As promptly as practicable after the date of the enactment of the Hazardous and Solid Waste Amendments of 1984 [Nov. 8, 1984], the Administrator shall  
(continued...) ”

necessary to protect human health and the environment, unless the owner/operator of the facility can justify not taking such action. RCRA §3008(h)<sup>197</sup> authorizes the EPA Administrator to order corrective action when he learns of a release from an interim status unit.

The RCRA Corrective Action requirements are implemented through a process that parallels the CERCLA process.<sup>198</sup> First, a RCRA facility assessment (RFA) is conducted. EPA uses essentially CERCLA's preliminary assessment/site investigation (PA/SI) methodology to

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<sup>195</sup>(...continued)

amend the standards under this section regarding corrective action required at facilities for the treatment, storage, or disposal, of hazardous waste listed or identified under section 3001 [42 USCS § 6921] to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the Administrator that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Such regulations shall take effect immediately upon promulgation, notwithstanding section 3010(b) [42 USCS § 6930(b)], and shall apply to--

- (1) all facilities operating under permits issued under subsection (c), and
- (2) all landfills, surface impoundments, and waste pile units (including any new units, replacements of existing units, or lateral expansions of existing units) which receive hazardous waste after July 26, 1982.

Pending promulgation of such regulations, the Administrator shall issue corrective action orders for facilities referred to in paragraphs (1) and (2), on a case-by-case basis, consistent with the purposes of this subsection."

<sup>196</sup>See definition of "facility", *supra* note 191.

<sup>197</sup>42 U.S.C. §6928(h): "Interim status corrective action orders. (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 3005(e) of this subtitle [42 USCS § 6925(e)], the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 3005(e) of this subtitle [42 USCS § 6925(e)], shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed \$25,000 for each day of noncompliance with the order."

<sup>198</sup>The RCRA Corrective Action program is codified at 40 C.F.R. Part 264, Subparts F and S. For more detailed discussions of RCRA Corrective Action see: John C. Chambers, Jr., Overview of RCRA Corrective Action Requirements, Chemical Waste Litigation Reporter, Vol. 20, No. 5, Oct. 1990 (reprinted in "Hazardous Waste & Superfund 1993: The Latest Directions from a New Administration" ABA Satellite Seminar, May 13, 1993); J. Steven Rogers, *Regulation of Solid and Hazardous Waste under the Resource Conservation and Recovery Act*, in ENVIRONMENTAL LAW section H (U.S. Dept of Justice, Legal Education Institute, April 1993); Stoll, *RCRA versus CERCLA*, *supra* note 51, 165; *Tug-of-War*, *supra* note 73; Terry J. Satterlee and Jerry L. Anderson, *RCRA Corrective Action: The Next Wave of Hazardous Substance Cleanup*, 59 UMKC L. Rev. 181 (Winter, 1991).

determine whether further investigation is needed. Second, a RCRA facility investigation (RFI) is conducted if, after the RFA, contamination is suspected. The RFI, a counterpart to CERCLA's remedial investigation (RI), defines the scope of the contamination. Third, a corrective measures study (CMS) and/or interim measures (IM) are required if contamination is determined to be above certain levels. The CMS involves identification of appropriate corrective measures (cleanup alternatives), as well as a study of the effectiveness and feasibility of the identified measures -- it parallels CERCLA's feasibility study (FS). IM include corrective actions taken at any point in the process to stabilize, control, or limit releases. Fourth, a corrective measure is proposed and implemented in the corrective measures implementation (CMI) phase. Public participation occurs through notice and comment concerning the proposed cleanup method.

EPA can delegate to a state the authority to conduct RCRA's hazardous waste programs, including corrective action.<sup>199</sup> EPA maintains significant control over state programs through its power to approve, revise, and withdraw approval from state programs. A state program must be consistent with the federal RCRA program and with state programs in other states.<sup>200</sup> States are not precluded from adopting or enforcing requirements that are more stringent or more extensive than the requirements in 40 C.F.R. Part 271, Subpart A, unless such state requirements are inconsistent with the federal program.<sup>201</sup>

### **3. Pros and Cons to RCRA Cleanups for DoD Facilities**

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<sup>199</sup>42 U.S.C. §6926(b), (f), and (h); 40 C.F.R. Part 271.

<sup>200</sup>40 C.F.R. §271.4.

<sup>201</sup>Consistency is addressed in 40 C.F.R. §271.4.

For federal facilities facing environmental cleanup action, there are advantages and disadvantages to proceeding under the RCRA Corrective Action regime.<sup>202</sup> A federal facility gains at least four advantages by conducting a cleanup action under RCRA corrective action.<sup>203</sup>

- ▶ First, RCRA corrective action covers hazardous substances not covered under CERCLA (mainly petroleum). Depending on the types of contaminants present at a site, this may allow the federal agency to address all the contamination under a single statutory scheme, rather than dividing the cleanup between RCRA and CERCLA.
- ▶ Second, the corrective action process<sup>204</sup> may be more flexible than the CERCLA process. Unless established in the facility permit, there is no required schedule for RCRA corrective action investigations and cleanups as there is under CERCLA.<sup>205</sup> The recently added CAMU designation<sup>206</sup> provides flexibility in managing remediation wastes from the cleanup action. For example, the physical dimensions of a CAMU are subject to the discretion of the regulator. Also, in a CAMU, some RCRA requirements can be waived.<sup>207</sup> Under certain circumstances, the CMS may be waived.<sup>208</sup>

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<sup>202</sup>Schafer, *USAF Authority*, *supra* note 143; *Tug-of-War*, *supra* note 73 at 382-394; Stoll, *RCRA versus CERCLA*, *supra* note 51, 165.

<sup>203</sup>The advantages and disadvantages discussed here pertain to federal facilities. They may or may not apply to private entities.

<sup>204</sup>This includes the RFA, RFI, and CMS, described above at page 56.

<sup>205</sup>*Tug-of-War*, *supra* note 73 at 387. Corrective action is required to begin within a "reasonable time" after the contamination levels are exceeded. 40 C.F.R. §264.100(c). That reasonable time period is to be specified in the permit. *Id.*

<sup>206</sup>*Supra* note 188. However, a CERCLA cleanup may also take advantage of the flexibility afforded by a CAMU if the substantive CAMU requirements are incorporated as ARARs. See the discussion concerning ARARs under CERCLA, *supra* note 136 and accompanying text.

<sup>207</sup>40 C.F.R. §264.552.

(continued...)

- ▶ Third, there is a definite contamination level which triggers need for corrective action.<sup>209</sup>

This provides the advantage of predictability in planning cleanup actions.

- ▶ Fourth, media cleanup standards (MCS) (similar to ARARs under CERCLA) for corrective actions are the same as the action levels that trigger corrective action.<sup>210</sup>

Again, the advantage here is in predictability. In addition, flexibility is enhanced because the triggering levels and cleanup levels in the permit can be based in part on risk assessment and actual use of the site.<sup>211</sup>

Opposing these advantages, at least five disadvantages face federal facilities under RCRA corrective action.

- ▶ First, and probably most significant to most federal facility managers, is the requirement to obtain permits to conduct corrective action.<sup>212</sup>

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<sup>208</sup>(...continued)

<sup>208</sup>See Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30798 (1990). However, this option has only been finalized in the CAMU and TU concepts.

<sup>209</sup>The contamination level that triggers the corrective action requirement is set out in the facility's RCRA permit. 40 C.F.R. §264.100. The level is set for each hazardous constituent listed in 40 C.F.R. §264.93, and is based on the concentration limits in 40 C.F.R. §264.94. There may or may not be a definite trigger in CERCLA, since the ARARs are identified for each site by the lead agency. However, the RCRA corrective action approach may not be advantageous if the permit standards are not based on risk assessment or actual use. In that case, as often happens in CERCLA cleanups, the cleanup level required may be higher than is reasonably necessary for the site. See, *Tug-of-War*, *supra* note 73 at n.149 (noting that under RCRA corrective action, soil at an industrial site may not have to be cleaned up to the same standards as soil at a residential site).

<sup>210</sup>In other words, the contamination level that triggers the need for corrective action (and that is established in the facility permit, as discussed in the previous footnote), is also the cleanup standard. 40 C.F.R. §264.100(e)(4). The corrective action can be completed when the concentration of hazardous constituents (listed in 40 C.F.R. §264.93) is reduced below the concentration limits set in the permit. See *Tug-of-War*, *supra* note 73 at 383-385.

<sup>211</sup>*Tug-of-War*, *supra* note 73 at n.149. Of course, those levels must not exceed the limits established in 40 C.F.R. §264.94.

<sup>212</sup>42 U.S.C. §§6924(u), 6925.

- ▶ Second, the waiver of sovereign immunity under the FFCA<sup>213</sup> may increase the exposure of the federal agency to federal, state, and local penalties for RCRA violations.
- ▶ Third, EPA or state control (where EPA has delegated RCRA authority to the state) over the RCRA corrective action process subjects the federal agency fisc and agenda to control by EPA or a state.
- ▶ Fourth, the broad definition of "facility", SWMU, and "on-site" under RCRA (and also the fact that hazardous *constituents* are covered) can subject the entire federal installation to control under RCRA.<sup>214</sup>
- ▶ Fifth, a RCRA permit is limited to RCRA hazardous wastes/constituents, and does not cover hazardous substances such as radioactive wastes.

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<sup>213</sup>*Infra* page 60. In addition, judicial review of any EPA action regarding a permit is more readily available under RCRA than it is under CERCLA. *Tug-of-War*, *supra* note 73 at 386; RCRA section 7006(b), 42 U.S.C. §6976(b). This may result in more delays during the cleanup action due to litigation.

<sup>214</sup>*Supra* notes 191, 178, 175; *see* 40 C.F.R. §§260.10, 264.100; 50 Fed. Reg. 28,702.

### C. FFCA

Of significance for this paper is the Federal Facilities Compliance Act of 1992<sup>215</sup> (FFCA), that waives sovereign immunity for the federal government from state enforcement of state laws dealing with solid and hazardous waste.<sup>216</sup> The primary purpose of the FFCA is "to ensure that Federal facilities are treated the same as private parties with regard to compliance with the requirements of RCRA."<sup>217</sup>

The FFCA was Congress' reaction against the use of sovereign immunity and the Unitary Executive principle by federal agencies to delay and avoid compliance with RCRA.<sup>218</sup> It was also a direct reaction to the Supreme Court opinion in *U.S. Department of Energy v. Ohio*.<sup>219</sup> The Supreme Court concluded that the waivers of sovereign immunity contained in RCRA and the Clean Water Act<sup>220</sup> (CWA) were not broad enough to allow a state to impose administrative punitive monetary penalties against federal agencies for past violations of RCRA and the CWA.<sup>221</sup> The primary effect of the waiver of sovereign immunity in the FFCA on federal facilities is that it subjects them to administrative fines under RCRA section 6001.<sup>222</sup> It does not,

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<sup>215</sup>Pub. L. No. 102-386, 106 Stat. 1505 (1992).

<sup>216</sup>See Laurent R. Hourcle and William J. McGowan, *Federal Facility Compliance Act of 1992: Its Provisions and Consequences*, 2 Fed. Facilities Envtl.J. 359 (Winter 1992-93) [hereinafter Hourcle and McGowan].

<sup>217</sup>EPA, Federal Facility Compliance Act; Enforcement Authorities Implementation, 58 Fed. Reg. 49,044 (1993) (citing H.Rep. No. 102-886, 102nd Cong., 2nd Sess., p.19 (1992)).

<sup>218</sup>See Darmody, *Hazardous Waste Law*, *supra* note 24, 160. The Unitary Executive Theory is summarized *infra* at note 297.

<sup>219</sup>503 U.S. 607 (1992).

<sup>220</sup>Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387.

<sup>221</sup>503 U.S. 607; Hourcle and McGowan, *supra* note 216, at 361.

<sup>222</sup>42 U.S.C. §6961.



however, affect any waiver of sovereign immunity in CERCLA or any other environmental statute.<sup>223</sup>

The FFCA, then, provides yet another reason for the federal facility to avoid RCRA. While the FFCA is limited to RCRA, Congress was very careful to eliminate any ambiguity concerning the extent of the waiver of sovereign immunity. The FFCA amended RCRA section 6001 so as to require the Federal government to “be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural..., respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.”<sup>224</sup> The amended RCRA section 6001(a) covers disposal and management of solid and hazardous waste; it lists in detail the substantive and procedural requirements, the “reasonable service charges”, and the sanctions to which the agency and individual employees are subject.<sup>225</sup> In addition, the FFCA specifies EPA enforcement authority over other federal agencies.<sup>226</sup> For example, the FFCA provides EPA the authority to issue administrative compliance orders pursuant to RCRA §3008(a).<sup>227</sup>

The net effect of the FFCA on federal agencies is substantial. Through this legislation,

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<sup>223</sup>Hourcle and McGowan, *supra* note 216, at n.2.

<sup>224</sup>42 U.S.C. §6961(a). Section 103 of the FFCA amended the definition of “person” under RCRA to include “each department, agency and instrumentality of the United States.” 42 U.S.C. §6903(15); Hourcle and McGowan, *supra* note 216, at 367-68.

<sup>225</sup>See Hourcle and McGowan, *supra* note 216, at 363-65.

<sup>226</sup>42 U.S.C. §6961(b) (added by FFCA section 102(b)); see Hourcle and McGowan, *supra* note 216, at 365-67.

<sup>227</sup>58 Fed. Reg. 49,044, *supra* note 217, at n.2 & accompanying text. However, under CERCLA, response authority and administrative order authority is given to the President, who has delegated that authority in E.O. 12580. *Id.*

states can exert control over federal agency decisionmaking in two key ways. First, states can exert some control over the federal fisc since the FFCA allows states to impose "all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or imposed for isolated, intermittent, or continuing violations."<sup>228</sup> EPA has acknowledged that the Anti-Deficiency Act<sup>229</sup> might create "unique payment issues" concerning payment of state penalties by federal agencies.<sup>230</sup> Little thought seems to have been devoted to the consequences of this built-in conflict between RCRA and the Anti-Deficiency Act.<sup>231</sup>

Second, the FFCA subjects an agency's priorities to state control.<sup>232</sup> In DoD, this means that the nationwide DoD environmental cleanup agenda could be pulled in many different directions by different states. One result could be the uneven and inefficient application of dwindling environmental restoration resources. The allocation of DoD environmental funding could depend more on the peculiarities of politics in a given state, rather than on the priority of a site within a national cleanup program.<sup>233</sup> As one commentator noted, "[s]tate enforcement actions may compel federal agencies to divert funds from high-priority federal programs either

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<sup>228</sup>42 U.S.C. §6961(a)(3); 58 Fed. Reg. 49,044, *supra* note 217, at 49,045; *see* Darmody, *Hazardous Waste Law*, *supra* note 24, 160 at 653; *see generally* Hourle and McGowan, *supra* note 216.

<sup>229</sup>31 U.S.C. §1341.

<sup>230</sup>58 Fed. Reg. 49,044, *supra* note 217, at n.5. EPA acknowledged that federal agencies are constrained by the Anti-Deficiency Act from making payments without appropriation of funds by Congress, and that if the Anti-Deficiency Act does preclude payment of a penalty, the EPA can do little more than require the federal agency to ask Congress for more money. *Id.*

<sup>231</sup>*See* Hourle and McGowan, *supra* note 216, at 360, 376.

<sup>232</sup>*See* Darmody, *Hazardous Waste Law*, *supra* note 24, 160, at 653.

<sup>233</sup>For example, most DoD cleanup sites are similar in terms of the type of environmental cleanup required. However, one site may be located in an affluent state with an active pro-environment state government, while the other may be located in state fighting to attract or keep industry to support a failing economy. The resulting uneven application of resources (or perhaps enforcement of different environmental standards) raises significant environmental justice issues.

to run state agencies or to clean up low-priority sites in the states with the most aggressive prosecutors.”<sup>234</sup>

The goal of ensuring the compliance of federal agencies with environmental regulations is a legitimate goal. However, in many respects the FFCA does not advance that goal. As noted above, federal agencies like DoD and DoE are already expending significant amounts of funds and resources to comply with environmental regulations across the board. Added incentives for compliance are present in the FFCA provisions exposing federal employees to state criminal liability.<sup>235</sup> This may effect some change in the institutional behavior of an agency.<sup>236</sup> However, any institutional incentive added by the other provisions of the FFCA is outweighed by the disadvantages of subjecting the fisc and agenda of a federal agency to state control.<sup>237</sup> As discussed below, such state control erodes the ability of an agency like DoD to perform its primary mission. Such state control also delays and increases the costs of environmental cleanup by making the requirements more confusing<sup>238</sup> and precluding a uniform approach by the agency.

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<sup>234</sup>See Darmody, *Hazardous Waste Law*, *supra* note 24, 160, at 653 (citing Hourcle and McGowan, *supra* note 216 at 362, 364).

<sup>235</sup>42 U.S.C. §6961(a); see Hourcle and McGowan, *supra* note 216 at 365; Darmody *Hazardous Waste Law*, *supra* note 24, 160 at 653.

<sup>236</sup>Darmody, *Hazardous Waste Law*, *supra* note 24, 160 at 654 (citing James B. Doyle, Note, *Who will Watch the Watchers?: Using Independent Counsel to Compel Federal Facilities to Comply with Federal Environmental Laws*, 26 Val.U.L.Rev. 671 (1992)).

<sup>237</sup>Enforcement provisions penalizing individuals, rather than penalizing a faceless government agency, would probably yield more effective deterrence. See Millan, *Federal Environmental Compliance*, *supra* note 24 at n.382 and accompanying text.

<sup>238</sup>For example, as noted above in Part II.D, federal agencies will be forced to chart a course between the Scylla of state penalties and fines, and the Charybdis of the Anti-Deficiency Act.

#### D. The Defense Environmental Restoration Program

Further support for CERCLA preeminence at DoD facilities is found in the Defense Environmental Restoration Program (DERP).<sup>239</sup> This statute directs the Secretary of Defense to conduct a program of environmental restoration at DoD facilities under the jurisdiction of the Secretary. The statute requires the DERP to be “carried out subject to, and in a manner consistent with,” CERCLA section 120.<sup>240</sup> EPA does not conduct the program, rather it acts only as a consultant to DoD.<sup>241</sup>

DERP is concerned not only with the identification, evaluation, and cleanup of environmental contamination, but also with the “[d]emolition and removal of unsafe buildings and structures” at current and formerly used DoD sites.<sup>242</sup> Under DERP, the Secretary of Defense is responsible for “all response actions with respect to releases of hazardous substances” from current DoD facilities or sites, sites controlled by DoD when the contamination occurred, or vessels owned or operated by DoD.<sup>243</sup> DERP response action are carried out in accordance with 10 U.S.C. §2701 and CERCLA.<sup>244</sup>

DERP is broad in its coverage. It addresses contamination from hazardous substances,

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<sup>239</sup>10 U.S.C. §2701.

<sup>240</sup>42 U.S.C. §9620.

<sup>241</sup>10 U.S.C. §2701(a)(3).

<sup>242</sup>10 U.S.C. §2701(b).

<sup>243</sup>10 U.S.C. §2701(c). Facilities or sites “controlled” by DoD are facilities or sites “owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary [of Defense].” The Secretary is not responsible for conducting a response action if EPA has already provided for a response action by a potentially responsible person under CERCLA section 122, 42 U.S.C. §9622. 10 U.S.C. §2701(c)(2).

<sup>244</sup>*Id.* The statute does allow DoD to pay “fees and charges imposed by State authorities” for permit services for hazardous substance disposal on DoD lands, but only to the same extent as such are imposed on private entities. 10 U.S.C. §2701(c)(3). Also, the only savings clause in the statute is found in the “Nonpreemption” provision in section 2701(i)(4), which is expressly limited to section 2701(i), which covers surety bonds.

pollutants, and contaminants.<sup>245</sup> Thus, it could be used to authorize response actions to releases not covered by CERCLA (e.g., radon, asbestos, petroleum).<sup>246</sup>

#### E. NEPA

A final aspect of the statutory framework is the relationship between the National Environmental Policy Act<sup>247</sup> (NEPA) and CERCLA and RCRA at DoD facilities. This relationship is relevant to CERCLA/RCRA integration at federal facilities for two reasons. First, NEPA constitutes a broad national commitment to protecting and promoting environmental quality.<sup>248</sup> Predating RCRA and CERCLA, NEPA requires federal agencies to consider the environmental consequences of certain agency actions.<sup>249</sup> In many cases, environmental restoration conducted by a federal agency might be considered a "major Federal action[]

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<sup>245</sup>42 U.S.C. §2701(b)(1).

<sup>246</sup>See Schafer, *USAF Authority*, *supra* note 143 at 3.

<sup>247</sup>42 U.S.C. §§4321-4370d.

<sup>248</sup>NEPA §§2 & 101, 42 U.S.C. §§4321, 4331; *Alabama ex rel Siegelman v. EPA*, 911 F.2d 499, 503-504 (11th Cir.1990). In 1970, President Nixon furthered the purpose and policy of NEPA through Executive Order 11514, Protection and Enhancement of Environmental Quality. This, like NEPA, stated general purposes and policies rather than specific procedures that had to be followed to the letter. Executive Order 11514 is a general directive to federal agencies to further national environmental goals. 35 Fed. Reg. 4247. Executive Order 11514 was amended by E.O. 11991, 42 Fed. Reg. 26967, 24 May 1977. E.O. 11991 amended Section 3(h) of Executive Order 11514, dealing with the CEQ responsibilities. The amendment directs CEQ to issue regulations implementing NEPA, and to design the regulations to make the EIS process more useful to decision-makers and the public, to reduce paperwork, and to focus on "real environmental issues and alternatives". Section 2(g), a new subsection, was added directing federal agencies to comply with the CEQ regulations, "except where such compliance would be inconsistent with statutory requirements."

<sup>249</sup>However, NEPA does not require an agency to "elevate environmental concerns over other appropriate considerations." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 100 S.Ct. 497, 500 (1980). Thus, judicial review is limited to the question of whether the agency *considered* the environmental consequences of its proposed action. The agency's choice of action is a matter of executive discretion and generally a court cannot substitute its judgment for that of the agency. *Id.* (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976)).

significantly affecting the quality of the human environment".<sup>250</sup> Second, it is helpful to examine the integration of NEPA and CERCLA, and of NEPA and RCRA. The "functional equivalence" doctrine used to exempt EPA from compliance with NEPA is helpful to this discussion because it is analogous to the "parity" concept EPA is currently proposing for RCRA/CERCLA integration.<sup>251</sup> In addition, such an examination highlights more differences between CERCLA and RCRA.

To ensure and to further this national commitment to protect and promote environmental quality, NEPA requires federal agencies to evaluate the environmental impact of proposed agency actions.<sup>252</sup> NEPA requires all federal agencies to --

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>253</sup>

This evaluation process has two important consequences. First, it forces the agency to include environmental considerations in its decision-making. Second, it provides the public with

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<sup>250</sup>NEPA §102(2)(C), 42 U.S.C. §4332(2)(C).

<sup>251</sup>*Infra* page 86. Under "parity", EPA would consider a CERCLA cleanup at a site the equivalent of a RCRA cleanup, eliminating any need to "re-open" the CERCLA cleanup decision to comply with RCRA requirements.

<sup>252</sup>NEPA §102(2)(C), 42 U.S.C. §4332(2)(C).

<sup>253</sup>*Id.*

environmental information concerning proposed federal actions, enabling the public to participate more effectively in federal agency decision-making.<sup>254</sup>

Generally, strict procedural compliance with NEPA or the federal regulations implementing the statute should not be required by EPA as long as the basic purpose of NEPA is achieved.<sup>255</sup> "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."<sup>256</sup> The general procedural requirements set out in the statute are implemented by the Council on Environmental Quality (CEQ) regulations<sup>257</sup> and by implementing regulations promulgated by each federal agency. The CEQ regulations recognize that "it is not better documents but better decisions that count."<sup>258</sup> Thus, NEPA and the CEQ regulations emphasize that NEPA is a means, not an end. NEPA requires federal agencies to comply "to the fullest extent possible."<sup>259</sup> The policy set forth in the CEQ regulations is tempered by similar

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<sup>254</sup>See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 1844-45, 104 L.Ed.2d 351 (1989).

<sup>255</sup>See *Wyoming v. Hathaway*, 525 F.2d 66, 71-73 (10th Cir.1975), *cert. denied sub nom Wyoming v. Kleppe*, 426 U.S. 906 (1976) ("[T]he substance of NEPA is such as to itself exempt EPA from the requirement of filing an impact statement. Its object is to develop in the other departments of the government a consciousness of environmental consequences. The impact statement is merely an implement devised by Congress to require government agencies to think about and weigh environmental factors before acting. Considered in this light, an organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement just to be issuing it.")

<sup>256</sup>40 C.F.R. §1500.1(c). Even so, NEPA does not mandate substantive environmental results, only consideration of environmental consequences. As the Supreme Court noted: "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558, 98 S.Ct. 1197 (1978).

<sup>257</sup>40 C.F.R. Ch V.

<sup>258</sup>40 C.F.R. §1500.1(c).

<sup>259</sup>NEPA §102. However, exemptions to NEPA compliance can be established by statute, by virtue of a conflict between NEPA and an agency's statutory requirements, due to emergencies, or under the functional equivalency doctrine. See generally Daniel R. Mandelker, *NEPA LAW AND LITIGATION*, Chapter 5 (2nd Ed., Clark (continued...))

language: "to the fullest extent possible" and "all *practicable* means", indicating reasonableness as a factor in interpreting the requirements.<sup>260</sup> The CEQ regulations direct agencies to reduce excessive paperwork by writing concise EISs, integrating NEPA requirements with other environmental review and consultation requirements, eliminating duplication with state and local procedures as well as with other federal procedures, and using categorical exclusions (CATEXs)

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<sup>259</sup>(...continued)

Boardman Callaghan 1992) [hereinafter Mandelker]. Several statutes contain express exemptions from NEPA compliance. For example, the Clean Air Act (CAA) is exempted from NEPA since actions taken under the CAA are statutorily declared not to be major federal actions significantly affecting the quality of the human environment. 15 U.S.C. §793(c)(1) (dealing with Energy Supply and Environmental Coordination). Most EPA actions under the Clean Water Act are exempt from NEPA by virtue of a similar statutory declaration. 33 U.S.C. §1371(c)(Not included in the exemption are federal financial assistance for the construction of publicly owned treatment works and permits for the discharge of any pollutant by a new source). Other examples of statutory exemptions include: Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §1419(d); Defense Production Act, 50 U.S.C. §§2095(h), 2096(i) (dealing with synthetic fuels); Disaster Relief Act, 42 U.S.C. §5159; Endangered Species Act, 16 U.S.C. §1636(k); National Forest Management Act, 16 U.S.C. §544o(f); Power Plant and Industrial Fuel Use, 42 U.S.C. §8473; Surface Mining Control and Reclamation Act, 30 U.S.C. §§1251(a), 1292(d); *see* Mandelker at §5.03[1]. A federal agency is also exempt if compliance with NEPA would result in a 'clear and unavoidable conflict' with the agency's statutory requirements, since NEPA does not repeal by implication other Federal laws. *Flint Ridge Development Company v. Scenic River Association of Oklahoma*, 426 U.S. 776, 788 (1976)). Such a conflict must be fundamental and irreconcilable. *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 206 (5th Cir.1978), *cert. denied* 439 U.S. 966 (1978); *see also*, *Westlands Water District v. NRDC*, 43 F.3d 457 (9th Cir. 1994)( government need not comply with NEPA EIS requirement because of irreconcilable conflict between the Central Valley Project Improvement Act and NEPA.(cited in ELR Update, Jan. 9, 1995). Finally, there are emergency exemptions to NEPA. 40 CFR §1506.11; *Crosby v. Young*, 512 F.Supp. 1363 (E.D.Mich.1981). *But see*, Comment, *Emergency Exceptions from NEPA: Who Should Decide?* 14 B.C.Env'tl.Aff.L.Rev. 481 (1987)(claiming that extensive application of the emergency exemption will frustrate NEPA's purposes). Other cases illustrating use of the emergency exemption (cited in EPA General Counsel Memorandum dated Sept. 1, 1982) include: *Dry Color Manufacturer's Ass'n v. Dep't of Labor*, 486 F.2d 98, 107-08 (3rd Cir. 1973) (EIS not a prerequisite for the promulgation of an emergency temporary standard under Occupational Safety and Health Act); *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142, 150 (5th Cir. 1973) (EIS unnecessary prior to approval by Federal Power Commission of emergency interim curtailment plan under the Natural Gas Act).

<sup>260</sup>40 C.F.R. §1500.2; *See Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 381 (DC Cir.1973), *cert. denied*, 417 U.S. 921 (1974). Contrast NEPA and its implementing regulations with the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, which is exclusive and almost inflexible in its requirements concerning endangered species. Note that NEPA has been held not applicable to decisions of the "Extinction Committee" under ESA §7(k). *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Also NEPA has been held not to apply to designations of critical habitat under ESA. *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995)(cited in ELR Update, March 6, 1995).



and Findings of No Significant Impact (FONSI) where appropriate.<sup>261</sup>

The functional equivalence doctrine is a narrow judicial exemption, generally limited to EPA actions, and applied when the procedures afforded under another statutory scheme are equivalent to the procedures in NEPA and its implementing regulations.<sup>262</sup> As it has been interpreted by courts, functional equivalence essentially foregoes formal adherence to NEPA (unless specifically required by Congress) when the agency has "recognized environmental expertise", and when the agency action includes a comprehensive procedure for evaluating environmental issues, for public participation, and for judicial review.<sup>263</sup> Courts have interpreted

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<sup>261</sup>40 C.F.R. §1500.4. RCRA also directs EPA to avoid duplication with "such other Acts of Congress as grant regulatory authority to the Administrator." RCRA §1006(b)(1). Office of Management and Budget (OMB) oversight and approval of agency information collection requests pursuant to the Paperwork Reduction Act (PRA) also encourages agencies to avoid duplicative and unnecessary information requests and reporting requirements. 44 U.S.C. §§3501-3520. Further support for the integration of NEPA into CERCLA and RCRA (rather than requiring strict compliance with NEPA) is found in the doctrine of resolving a conflict between two federal laws by giving precedence to the latter enactment. *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d at 380 (addressing a conflict between NEPA and the CAA).

<sup>262</sup>The "functional equivalence doctrine" has been recognized in at least eight federal circuits. *State of Alabama ex rel Siegelman v. EPA*, 911 F.2d 499, 505 n.12 (11th Cir.1990)(citing *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 207 (5th Cir.1978); *State of Wyoming v. Hathaway*, 525 F.2d 66, 70 (10th Cir.1975); *Indiana & Michigan Elec. Co. v. EPA*, 509 F.2d 839, 843 (7th Cir.1975); *South Terminal Corp. v. EPA*, 504 F.2d 646, 676 (1st Cir.1974); *Portland Cement Ass'n. v. Ruckelshaus*, 486 F.2d 375, 380 (D.C.Cir.1973); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 174 (6th Cir.1973), *cert. denied*, 425 U.S. 934 (1976); *Appalachian Power Co. v. EPA*, 477 F.2d 495, 508 (4th Cir.1973)). Courts have not always interpreted functional equivalence in the same way. For example, the Seventh Circuit found functional equivalence in one case based in part on EPA's duty to file periodic policy and economic cost reviews. *Indiana and Michigan Electric Co. v. EPA*, 509 F.2d 839 (7th Cir.1975). That basis for functional equivalence had been rejected by the D.C. Circuit in *Essex Chemical v. Ruckelshaus*, 486 F.2d 427 (D.C.Cir.1973), *cert. denied*, 416 U.S. 969 (1974).

<sup>263</sup>In the Matter of: Chemical Waste Management, Inc. (Emelle, AL) RCRA Permit No. ALD 000622464, RCRA Appeal No. 87-12, EPA, 1988 RCRA LEXIS 30 (May 27, 1988). In that appeal to EPA, the opponents of the RCRA permit argued that the functional equivalency doctrine does not apply unless all five of NEPA's "core issues" have been considered. NEPA's five core issues are (1) the environmental impact of the proposed action; (2) any unavoidable adverse environmental effects (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and long-time productivity; and (5) any irreversible and irretrievable commitments of resources entailed by the proposed action. *Id.* at n.10; 42 U.S.C. §4332(2)(C). EPA responded that the prevailing judicial interpretation of functional equivalency is that "NEPA is fulfilled where the federal action has been taken by an agency with recognized environmental expertise and whose procedures ensure extensive consideration of environmental concerns, public participation, and judicial review." RCRA Appeal No. 87-12 at n.11 and accompanying text (citing *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 834 n.4 (6th Cir. 1981); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 750 (D.C. Cir. 1974) (holding that functional equivalency applies where EPA procedures

(continued...)

functional equivalence narrowly, generally limiting the exemption to EPA actions.<sup>264</sup>

RCRA and NEPA are integrated in EPA actions under the functional equivalence doctrine. When issuing a permit under RCRA, EPA is not subject to the EIS provisions of NEPA §102(2)(C).<sup>265</sup> This regulation has received some criticism, but has not been repealed.<sup>266</sup> It was

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<sup>263</sup>(...continued)

require "orderly consideration of diverse environmental factors and... 'strike a workable balance between some of the advantages and disadvantages of full application of NEPA'" (quoting *Portland Cement Ass'n*, 486 F.2d at 386); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1305-06 (10th Cir. 1973); *Maryland v. Train*, 415 F. Supp. 116, 122 (D. Md. 1976)).

<sup>264</sup>*Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d at 386-387. The court noted that the exemption it was carving out was narrow, and that NEPA still applied to non-environmental agencies. The court discerned four factors that supported exemption of EPA from NEPA compliance. *Id.* at 383-384. First, allowing EPA to operate free from the NEPA procedural requirements "best serves the objective of protecting the environment which is the purpose of NEPA." Second, NEPA is a "broadly applicable measure that only provides a first step." The goals set forth in NEPA can only be met if specific duties are undertaken by specific agencies. Third, the need for expeditious responses to environmental threats would be thwarted by imposing the time-consuming NEPA EIS or EA requirements. Fourth, levying the procedural requirements of NEPA on top of the substantive and procedural requirements of another environmental statute could be abused by opponents of environmental protection. The NEPA requirement could be used in much the same way it is now used by environmental interest groups: to hinder and delay the proposed agency action. In a 1990 case, the Eleventh Circuit noted that most circuits agree that "an agency need not comply with NEPA where the agency is engaged primarily in an examination of environmental questions and where 'the agency's organic legislation mandate[s] specific procedures for considering the environment that [are] functional equivalents of the impact statement process.'" *State of Alabama ex rel Siegelman v. EPA*, 911 F.2d 499, 504 (11th Cir. 1990)(quoting *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 207 (5th Cir. 1978)). The courts recognize that there is "little need in requiring a NEPA statement from an agency whose *raison d'être* is the protection of the environment and whose decision...is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework. 911 F.2d at n.11 (quoting *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973)).

<sup>265</sup>40 C.F.R. §124.9(b)(6); 44 Fed. Reg. 34,247 (June 14, 1979). The notice proposing this rule noted that "at least ten appellate decisions have considered the applicability of [the NEPA impact analysis] requirement to EPA. All ten have concluded that the Agency is exempt from the requirements of NEPA because its own processes provide for the "functional equivalent" of that Act." 45 Fed. Reg. at 33173, May 19, 1980 (citing *Maryland v. Train*, 415 F. Supp. 116, 122 (D. Md. 1976)).

<sup>266</sup>Comment, Kristina Hauenstein, *RCRA Immunity from NEPA: The EPA Has Exceeded the Scope of its Authority*, 24 San Diego L. Rev. 1249 (Sept/Oct 1987). A central argument of the article is that RCRA permit requirements are not the functional equivalent of an EIS because the RCRA requirements vary depending on the type of project and because RCRA does not require consideration of alternatives. *Id.* at n.58 and accompanying text. However, later EPA regulations for the RCRA corrective action program require a Corrective Measures Study (CMS), analogous to the CERCLA feasibility study (FS), that involves consideration of remedial alternatives. Stoll, *RCRA versus CERCLA*, *supra* note 51, 165 at 169 (citing 55 Fed. Reg. at 30810, 30813 (1990)).

recently upheld by the Eleventh Circuit in *Alabama ex rel Siegelman v. EPA*.<sup>267</sup> Petitioners argued that EPA was required to prepare an environmental impact study ("EIS") under NEPA before issuing a final operating permit for a hazardous waste management facility at Emelle, Alabama. While acknowledging that a federal agency normally is required to prepare an EIS whenever it proposes action that will have a significant effect on the human environment (and that issuance of an operating permit to the largest commercial hazardous waste management facility in the nation constituted a major federal action that will significantly affect the human environment), the court nonetheless concluded that RCRA should control in this situation. While the RCRA procedures may not mirror exactly the requirements levied under NEPA, the RCRA substantive and procedural requirements aim toward the same goals as NEPA: agency consideration of environmental consequences of proposed agency actions, with meaningful public participation in the process. The court concluded that "Congress did not intend for EPA to comply with NEPA when RCRA applies to the particular EPA activity."<sup>268</sup> Given the flexibility inherent in NEPA, this approach is reasonable and actually furthers the goals of NEPA by focusing on the end result -- consideration of environmental consequences in government

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<sup>267</sup>911 F.2d 499 (11th Cir.1990)(appeal from the decision of the EPA Administrator, RCRA Appeal No. 87-12, *supra* note 263); *accord* *Western Nebraska Resources Council v. EPA*, 943 F.2d 867 (8th Cir.1991).

<sup>268</sup>911 F.2d at 505. The court also noted that the functional equivalency doctrine is generally recognized in the federal courts and that Congress has not amended NEPA to preclude the application of this doctrine to NEPA. The court interpreted statutory exemptions from NEPA in the CAA and FWPCA to be "Congress's way of making more obvious what would likely occur as a matter of judicial construction." 911 F.2d at n.12. In addition, the court noted the traditional view that "specific statutes prevail over general statutes dealing with the same basic subjects." 911 F.2d at 504. NEPA is a general statute directing federal agencies to consider the possible environmental consequences of proposed agency actions, and to allow the public to learn about and comment on the proposed action. RCRA is "the later and more specific statute directly governing EPA's process for issuing" such permits. *Id.*

decision-making -- rather than on the procedural means to that end.<sup>269</sup>

The integration of CERCLA and NEPA has not been resolved to the same degree as that of RCRA and NEPA.<sup>270</sup> A key difference between RCRA corrective actions and CERCLA response actions is that RCRA corrective actions are part of a regulatory program and are conducted pursuant to a permit issued by EPA or a designated state authority. As discussed above, NEPA is therefore satisfied since the permit process addresses NEPA concerns and is conducted by an agency with recognized environmental expertise.<sup>271</sup> Federal facility CERCLA response actions, in comparison, are not regulatory in nature, but are response actions often

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<sup>269</sup>The regulation is also consistent with the Congressional mandate that EPA administer and enforce RCRA in such a way as to avoid duplication with other environmental statutes that grant regulatory authority to EPA. RCRA section 1006(b), 42 U.S.C. §6905(b).

<sup>270</sup>EPA Memorandum, Voluntary NEPA Review at Federal Facility CERCLA Sites, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Elliott Laws, Assistant Administrator for Solid Waste and Emergency Response, to Regional Administrators (December 13, 1994) (reprinted in Bernard K. Schafer, 1995 *CERCLA Handbook* 127 [unpublished]). The memorandum notes that the "applicability of NEPA to CERCLA activities has not been definitively addressed judicially".

<sup>271</sup>See discussion of functional equivalence *supra* note 263 and accompanying text concerning the factors required for functional equivalence. The application of NEPA to RCRA, as compared to the application of NEPA to CERCLA actions, was briefly discussed in a footnote in *Greenpeace, Inc. v. Waste Techs. Indus.*, Case No. 4:93CV0083, 1993 U.S. Dist. LEXIS 5001, at \*31 n.4; 37 ERC (BNA) 1736 (N.D. Ohio, E.Div. filed Mar. 5, 1993). One of Greenpeace's allegations in that case was that EPA violated NEPA by failing to prepare an EIS for a RCRA permit granted to a hazardous waste treatment facility in Ohio. The court held that NEPA does not apply to RCRA actions, noting that "RCRA is, by regulation, the 'functional equivalent' of NEPA." *Id.* at \*28-29 (citing 40 C.F.R. §124.9(b)(6) and *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990)). The court also noted that "Greenpeace has failed to identify any case law which challenges this view." *Id.* at \*30. Greenpeace did argue that NEPA should apply to the RCRA action at issue because EPA sometimes applies NEPA to CERCLA cases. The court rejected that argument because of the differences between RCRA and CERCLA. The court explained that CERCLA is a remedial statute concerned with the assignment of cleanup liability at existing hazardous waste sites. RCRA, however, is a regulatory statute governing the generation, storage, transportation, treatment, and disposal of hazardous waste. As such, RCRA is more analogous to the Clean Air Act and the Clean Water Act, both of which are statutorily exempt from NEPA. *Supra* note 259. The court opined that this difference between RCRA and CERCLA also accounted for the requirement of more public participation and environmental assessment in RCRA. Courts normally apply functional equivalence to regulatory, rather than remedial, site-specific actions. However, as long as the requirements for functional equivalency are met and there is no statutory requirement that the activity comply with NEPA, the exemption should be equally applicable to site-specific non-regulatory activities, such as remedial actions. EPA Office of General Counsel Memorandum from Robert M. Perry, Associate Administrator and General Counsel, to Rita M. Lavelle, Assistant Administrator for Solid Waste and Emergency Response, *Applicability of Section 102(2)(C) of the National Environmental Policy Act of 1969 to Response Actions Under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, at n.19 (citations omitted) (September 1, 1982) (LEXIS, Envirn library, ALLEPA file) [hereinafter EPA CERCLA/NEPA Memorandum].

carried out by lead agencies other than EPA.<sup>272</sup> Other aspects of CERCLA also account for the different ways in which CERCLA and RCRA are integrated with NEPA. Most NEPA challenges to CERCLA response actions are barred or at least delayed by CERCLA section 113(h), which prevents most challenges until the response action, or a discreet portion thereof, is complete.<sup>273</sup>

The applicability of NEPA to CERCLA actions is also complicated by the distinction between removal actions and remedial actions under CERCLA. CERCLA removal actions are generally short-term, immediate responses taken to "prevent, minimize, or mitigate damage"

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<sup>272</sup>*Greenpeace, Inc. v. Waste Techs. Indus.*, *supra* note 271 at \*31 n.4. In addition, the functional equivalence requirement that the agency be one with "recognized environmental expertise" cannot always be met just because an agency has an environmental role -- e.g. implementing an environmental statute. *Jones v. Gordon*, 621 F.Supp. 7 (D.Alaska 1985), *aff'd on other grounds*, 792 F.2d 821 (9th Cir.1986). For example, in *Texas Committee on Natural Resources v. Bergland*, the Forest Service also raised a functional equivalence argument. 573 F.2d at 208. The court rejected this argument on the basis that functional equivalence is limited to environmental agencies. Since the Forest Service's sole responsibility is not environmental protection, but rather involves the management of the nation's timber resources and the consequent balancing of environmental and economic concerns, the court concluded that the functional equivalence exemption did not apply. *Id.* The same argument could be used against a NEPA exemption for DoD cleanups conducted under CERCLA. However, the court's distinction in *Texas Committee on Natural Resources v. Bergland*, is not entirely satisfying. As one commentator points out, unless the distinguishing factor in the case is that the Forest Service is not the EPA, then the opinion is inconsistent with other functional equivalence cases. Mandelker, *supra* note 259 at §5.03[8] (August 1994 supplement). After all, EPA, like the Forest Service or DoD, is required to balance environmental concerns against economic considerations in many areas of its responsibilities. For example, EPA is required to prepare an economic impact assessment before promulgating or revising certain regulations under the CAA section 317. 42 U.S.C. §7617. Under the Federal Water Pollution Control Act, EPA must consider costs in determining control measures and practices. 33 U.S.C. §1314(b)(1)(B). A more consistent and more reasonable approach would focus on the procedural requirements under the agency statute. If the statute requires a careful and comprehensive evaluation of environmental factors, consideration of reasonable alternatives, and allows for public participation in the process, then the requirements of functional equivalence have been met. See *Maryland v. Train*, 415 F.Supp. 116. Given the consideration of environmental impact and provisions for public participation under CERCLA, this argument supports a NEPA exemption based on functional equivalence for DoD cleanups under CERCLA.

<sup>273</sup>42 U.S.C. §9613(h). For example, in *North Shore Gas v. EPA*, 930 F.2d 1239 (7th Cir.1991), the NEPA challenge to the CERCLA response action was never discussed because the challenge was held to be barred by CERCLA section 113(h). Since opportunity for judicial review is a factor to be considered in determining functional equivalence with NEPA, the section 113(h) jurisdictional bar may help explain the absence of a clear judicial ruling on the applicability of NEPA to CERCLA actions. See functional equivalence discussion *supra* note 263 and accompanying text; *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d at 386 (Noting that judicial review guards against arbitrary disregard of environmental consequences by EPA, yet has the added advantage of imposing no new administrative burden on the agency).

from an actual or threatened release.<sup>274</sup> The requirement for an expeditious response can exempt the action from NEPA on the basis of a conflict between the NEPA EIS requirement and the CERCLA requirement to expedite removal actions.<sup>275</sup> CERCLA remedial actions are long-term actions involving permanent remedies to prevent or minimize actual or threatened releases.<sup>276</sup> Generally, EPA considers an exemption from NEPA for a CERCLA remedial action to be justified on functional equivalency grounds.<sup>277</sup> The time-consuming NEPA EIS process usually does not conflict with CERCLA remedial actions requirements since remedial actions normally do not require an immediate response, allowing sufficient time for careful planning and

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<sup>274</sup>CERCLA section 101(23), 42 U.S.C. §9601(23).

<sup>275</sup>Conflict between NEPA requirements and the statutory requirements of an agency is one of the exemptions to NEPA. *Supra* note 259. In 1982, when asked whether NEPA applies to CERCLA response actions, the EPA Associate Administrator and General Counsel responded: "the need for expedition in carrying out removal actions exempts such actions from the EIS requirement". U.S. EPA Office of General Counsel Memorandum, *Applicability of Section 102(2)(C) of the National Environmental Policy Act of 1969 to Response Actions Under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, September 1, 1982. The General Counsel explained that "NEPA does not repeal by implication other Federal laws". *Id.* (citing at n.5 *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973)). If compliance with NEPA section 102(2)(C) creates a "clear and unavoidable conflict" with the purpose or procedure of the agency's organic statute, then courts have exempted the agency from compliance with NEPA. *Id.* (citing *Flint Ridge Development Company v. Scenic River Association of Oklahoma*, 426 U.S. 776, 788 (1976) (exemption upheld where 30-day time limit prescribed by the Interstate Land Sales Full Disclosure Act for approval or disapproval of property disclosure statement made it impossible for agency to accomplish a formal EIS); *Dry Color Manufacturer's Ass'n v. Dep't of Labor*, 486 F.2d 98, 107-08 (3rd Cir. 1973) (exemption upheld where EIS would interfere with the prompt promulgation of an emergency temporary standard under Occupational Safety and Health Act). EPA also seems to favor expeditious CERCLA actions over strict NEPA compliance. The EPA's concern with expediency was reflected in a 1994 memorandum concerning voluntary NEPA compliance at federal facility CERCLA sites. EPA Memorandum, *Voluntary NEPA Review*, *supra* note 270. According to the memorandum, DoE, the Army, and the Air Force voluntarily comply with NEPA at such cleanup sites, motivated in part by concerns that failure to apply NEPA will result in future litigation, causing cleanup delays. Acknowledging that concern, EPA nonetheless stated that "delays due to NEPA do not excuse an agency's failure to adhere to negotiated CERCLA timetables." *Id.*

<sup>276</sup>CERCLA section 101(24), 42 U.S.C. §9601(24).

<sup>277</sup>U.S. EPA Office of General Counsel Memorandum, September 1, 1982, *supra* note 271. In a 1988 consent decree involving a CERCLA action, functional equivalency with NEPA was granted on the basis of the Remedial Investigation and Feasibility Study (RI/FS), which included the "necessary and appropriate investigation and analysis of environmental factors," and consideration and evaluation of the recommended alternative. Also, there was opportunity for public comment before the final selection of the remedial alternative. *U.S. v. General Motors Corp. and Harvey & Harvey, Inc.*, No. 87-464-CMW, 1988 EPA Consent LEXIS 35, 71 (D.Del. Mar. 9, 1988).

evaluation.<sup>278</sup> However, CERCLA remedial actions can meet the functional equivalency test if the CERCLA process affords a full consideration of environmental issues and affords adequate public participation in the process.<sup>279</sup> DoD remedial actions conducted under CERCLA generally should meet a functional equivalency type of test since the process mandated by CERCLA and the NCP considers environmental issues<sup>280</sup> and affords an opportunity for public participation.<sup>281</sup>

Furthermore, the requirements of NEPA could be considered ARARs under CERCLA. NEPA is largely procedural in terms of specific requirements. However, its substantive requirements essentially involve a weighing or consideration of the environmental effects of a proposed action. If those effects are considered, as when the lead agency considers the cleanup levels achievable with a given remedy, then the agency has substantively complied with NEPA.

The issue of strict, formal compliance with the procedural and substantive requirements of NEPA in CERCLA actions boils down to a policy decision. On the one hand, the plain language of NEPA supports strict adherence to its requirements. Some RCRA corrective actions

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<sup>278</sup>*Id.*

<sup>279</sup>*Id.* at n.14-21 and accompanying text. The EPA memorandum notes that while the Senate Report accompanying S. 1480 (the Senate version of the Superfund legislation) stated that under some circumstances an EIS might be necessary in remedial actions, the legislative history does not bar the use of the functional equivalency exemption in CERCLA remedial actions. *Id.* at n.14 (citing S. Rep. 848, 96th Cong., 2d Sess. 61 (1980)). The acknowledgment that an EIS *might* be necessary reflects an intent that the environmental consequences of remedial actions be adequately evaluated. The functional equivalency exemption is consistent with that intent. *Id.*

<sup>280</sup>*Id.* at n.22-24. The substantive and procedural requirements for remedial action at a DoD facility under CERCLA, the NCP, and DoD regulations meet the NEPA requirement for a full evaluation of environmental consequences, including consideration of alternative remedies. CERCLA section 104(b), 42 U.S.C. §9604(b) (Investigations, monitoring, and coordination); CERCLA section 105, 42 U.S.C. §9605 (National Contingency Plan); CERCLA section 120(e), 42 U.S.C. §9620(e) (requiring the federal agency that owns the facility to conduct an RI/FS, and requiring the IAG to include a review of alternative remedial measures and to comply with the public participation requirements under CERCLA section 117.). Under Department of the Air Force regulations, investigatory activities in support of remedial actions are listed as categorical exclusions (CATEX) to the NEPA EIS requirement. 32 C.F.R. Part 989, Atch. 2, A2.3.26 (noting that this CATEX “does not apply to the selection of the remedial action.”).

<sup>281</sup>Public participation is required under CERCLA section 117. 42 U.S.C. §9617. CERCLA cleanups at federal facilities must afford “relevant State and local officials the opportunity to participate in the planning and selection of the remedial action.” 42 U.S.C. §9620(f).

and some CERCLA cleanup actions at a federal facility might be considered major federal actions that could significantly affect the quality of the human environment. The procedural requirements of either RCRA corrective action or CERCLA are not exactly the same as NEPA. If the cleanup action is a major federal action significantly affecting the quality of the human environment, then the analysis requirements under NEPA and its regulations are applicable to such cleanup actions. On the other hand, the procedural and substantive requirements of RCRA and CERCLA essentially provide the "functional equivalence" of the NEPA requirements, as argued above. Thus it would be duplicative and inefficient to require compliance with NEPA in addition to compliance with RCRA or CERCLA.

The overall goal of any environmental cleanup action should be environmental restoration. Compliance with substantive cleanup standards, not with a specific procedural framework, is the key factor in a cleanup action.<sup>282</sup> The flexible, result-oriented "functional equivalence" approach should prevail when considering questions of NEPA applicability to cleanup actions under RCRA or CERCLA. A similar flexible approach should govern questions of RCRA/CERCLA integration at federal facility cleanup sites.

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<sup>282</sup>59 Fed. Reg. 55,778 (1994) (to be codified at 40 C.F.R. Parts 264, 265, 270, and 271) (proposed Nov. 8, 1994). In the proposed rule concerning TSD facility post-closure care under RCRA, EPA proposed an alternative to the requirement that permits be issued in such cases. The requirements or conditions for post-closure care could be imposed, at EPA's discretion, "through a permit, a RCRA enforcement authority, a Superfund authority, or a combination of these or other legal authorities. Similarly, an authorized State could impose conditions under a State cleanup authority. What is essential, in EPA's view, is that facilities meet the substantive standards currently imposed through post-closure permits, not that a specific regulatory authority be used to impose these standards." *Id.* at 55,783. For example, EPA explained consistency with RCRA corrective action requirements as follows: at least in the area of post-closure care, EPA considers an alternative legal authority consistent when it includes "facility-wide assessments" and when it addresses "possible releases (including off-site releases) from all solid waste management units within the facility boundary." *Id.* at 55,784.



#### **IV. The Argument for Federal Control**

The statutory and regulatory framework governing response actions to hazardous substance releases creates a comprehensive system of federal control. CERCLA grants response authority to the President. The President delegated that authority to DoD for hazardous substance releases on or from DoD facilities or vessels. The NCP, which implements CERCLA, defines the lead agency as the agency responsible for planning and implementing the response action, in consultation with the EPA. The NCP also recognizes the lead agency status of DoD for releases on or from DoD facilities or vessels. In addition, common sense dictates federal control over cleanup actions at federal facilities. Confusion and delay result from duplicative and overlapping authorities at a site. The nature of state and local control and requirements will vary from site to site, hindering federal agency efforts to devise and implement a national strategy to deal with hazardous substance releases. Furthermore, state and local control at federal facilities subjects the federal agency's budget and agenda to state and local control, upsetting the balance of priorities struck by the federal agency and perhaps threatening that agency's ability to fulfill its mission.

##### **A. CERCLA Response Authority Delegated to DoD**

Congress intended CERCLA to cover most hazardous substance cleanup activities.<sup>283</sup> Thus, CERCLA section 104 grants the President the authority to respond to releases of hazardous substances as well as to releases of pollutants and contaminants that may pose an

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<sup>283</sup> See Part III.A., *supra* at page 19, discussing the purpose of CERCLA; Elizabeth Cheng, Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U.Chi.L.Rev. 845, 869 n.103 (Summer 1990) [hereinafter *Lawmaker as Lawbreaker*].

imminent and substantial danger to the public health and welfare. Congress further granted the President the authority to delegate his CERCLA 104 authority to federal agencies.<sup>284</sup>

In Executive Order 12580, the President delegated his CERCLA section 104 authority generally to EPA, but specifically to DoD and DoE for releases on or from DoD and DoE facilities and vessels. Furthermore, federal agencies must comply with CERCLA and NCP when responding to releases of hazardous substances.<sup>285</sup> EPA recognizes DoD's authority as lead agency under the NCP for releases on or from DoD facilities or vessels.<sup>286</sup>

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<sup>284</sup>CERCLA section 115, 42 U.S.C. §9615.

<sup>285</sup>CERCLA section 120, 42 U.S.C. §9620. Sections 120(a)(1) & (2) require federal agencies to comply with CERCLA to the same extent, procedurally and substantively, as non-governmental entities. As discussed below, this requirement makes little sense since federal agencies differ significantly from private corporations and other non-governmental entities and since federal agencies are not treated the same as non-governmental entities under CERCLA. Further confusion is created by section 120(a)(4), which applies state laws concerning removal and remedial actions to non-NPL sites owned or operated by a federal agency. Such duplicative and overlapping requirements should either be eliminated from the statute, or the statute should be clarified. This paper argues that, if this provision is not eliminated, the requirement should be clarified by an express statement (either in a regulation or statutory amendment) to the effect that the lead agency has the authority to determine the applicability of state requirements pursuant to the ARARs process in CERCLA section 121 and pursuant to the state and local participation requirement in CERCLA section 120(f). In other words, state and local governments can participate in the process, but final authority regarding remedy selection and cleanup standards (and, if appropriate, the decision whether to proceed under RCRA or CERCLA) rests with the federal lead agency.

<sup>286</sup>40 C.F.R. §§ 300.5, 300.120.

## B. Lead Agency Authority

The NCP defines "lead agency" as "the agency that provides the OSC/RPM to plan and implement response action under the NCP."<sup>287</sup> DoD has responsibility to take all action necessary with respect to releases on or from a facility or vessel under DoD jurisdiction or control.<sup>288</sup> The lead agency identifies ARARs,<sup>289</sup> and under certain conditions may waive ARARs.<sup>290</sup> The lead agency is empowered to select remedies under CERCLA 104 and 106 since CERCLA 121 requires cleanup actions to meet stringent standards and to be assessed for economic and policy considerations. Such a determination is best entrusted to an executive agency with the expertise to make such a judgment.<sup>291</sup> The designated federal lead agency "maintains its lead agency responsibilities whether the remedy is selected by the federal agency for non-NPL sites or by EPA and the federal agency or by EPA alone under CERCLA section 120."<sup>292</sup> The lead agency consults with the support agency, if one exists.<sup>293</sup> Thus, DoD, as a lead

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<sup>287</sup>40 C.F.R. § 300.5. The lead agency could be EPA, the Coast Guard, another federal agency, or a state or political subdivision of a state. However, if the release is on or the sole source of the release is a facility or vessel under the jurisdiction, custody, or control of DoD or DoE, then DoD or DoE is the lead agency. *Id.* The Remedial Project Manager (RPM) is the official designated by the lead agency to coordinate, monitor, or direct remedial or other response actions under NCP, Subpart E. The On-Scene Coordinator (OSC) is the federal official predesignated by EPA or the Coast Guard to coordinate and direct federal responses under NCP, Subpart D (Operational Response Phases for Oil Removal), or an official designated by the lead agency to coordinate and direct removal actions under the NCP, Subpart E (Hazardous Substance Response). Lead agency responsibilities are further described in 40 C.F.R. §§300.120, 300.135.

<sup>288</sup>40 C.F.R. §300.175(b)(4).

<sup>289</sup>40 C.F.R. §300.400(g)(1)-(5); *see Tug-of-War*, *supra* note 73 at n.86.

<sup>290</sup>42 U.S.C. §121(d)(4); Executive Order No. 12580, *supra* note 79.

<sup>291</sup>*U.S. v. Seymour Recycling Corp.*, 679 F.Supp. 859, 862 (D.C.Ind.1987).

<sup>292</sup>*Id.*

<sup>293</sup>40 C.F.R. §300.5. The support agency is the agency or agencies that provide data to the lead agency, review response data and documents, and provide other assistance as requested by the OSC or RPM. The support agency may also concur on decision documents. *Id.*

agency, essentially stands in the shoes of EPA at a CERCLA cleanup site.

The NCP definition of "lead agency" should be followed because the NCP "is the means by which EPA implements CERCLA."<sup>294</sup> The NCP "provide[s] the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants."<sup>295</sup> CERCLA requires a response action be consistent with the NCP.<sup>296</sup>

The issue of lead agency authority for DoD raises legitimate concerns over the ability of a federal agency to regulate itself.<sup>297</sup> States support their assertions of RCRA authority at a

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<sup>294</sup>Ohio v. EPA, 997 F.2d 1520, 1525 (D.C. Cir.1993).

<sup>295</sup>40 C.F.R. §300.1

<sup>296</sup>42 U.S.C. §9607(a)(4)(B); 42 U.S.C. §9620(a)(2) [precluding federal agencies from adopting or using guidelines or rules inconsistent with the guidelines or regulations established by EPA under CERCLA section 120].

<sup>297</sup> A corollary issue is the extent to which EPA is able to exercise its enforcement authority against other federal agencies. During the 1980's, other federal agencies argued that only the President (or his designee), rather than any one agency, is empowered to resolve disputes between federal agencies. This argument came to be known as the "unitary executive theory". See generally Laurent R. Hourcle, *Federal Facilities* 53-57 (February 1995)(on file with the author) (discussion related to EPA and enforcement of environmental laws); Manus, *Federalism under Siege*, *supra* note 18 at n.211-213 and accompanying text; Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 Admin. L. J. Am. U. 461 (Fall 1994)(contains overview of the arguments of proponents and opponents of the unitary executive theory); Cass R. Sunstein, *The Myth of the Unitary Executive*, 7 Admin. L. J. Am. U. 299 (Summer 1993)(attacking as an "ahistorical myth" the view that the Framers "put the President on top of a pyramid, with the administration below him." *Id.* at 301.); David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 Admin. L. J. Am. U. 309 (Summer 1993); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 Cardozo L. Rev. 219 (1993)(examining the unified executive theory in the context of statutory interpretation, specifically EPA's 1992 permit rule implementing Title V of the 1990 Clean Air Act Amendments); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 Cardozo L. Rev. 201 (1993)(arguing that the President's constitutional powers over the administration should be determined "in light of a careful assessment of the particular functions involved." *Id.* at 202.); Millan, *Federal Environmental Compliance*, *supra* note 24 at n.136-338 and accompanying text. Even though it was overruled on other grounds by the Supreme Court, *In Re Sealed Case* contains a brief, but cogent description of the constitutional and historical underpinnings of the unitary executive theory. 838 F.2d 476, 488-90 (D.C. Cir.1988), *rev'd* 487 U.S. 654. At least with regards to RCRA, Congress established the authority of EPA to exercise its enforcement power against other federal agencies by enacting the FFCA in 1992. Perusal of the articles listed above reveals that the validity of the unitary executive theory is still being debated. This issue is beyond the scope of this paper. However, the basic idea of vesting decision-making authority in a single entity is applicable here. For example, President Carter directed OMB to resolve any disputes between EPA and another federal agency, if the agencies could not resolve it themselves. Exec. Order No.12,088, 43 Fed. Reg. 47707 (1978). Similarly, the President can, and should, direct DoD to resolve disputes concerning RCRA/CERCLA

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CERCLA cleanup site by arguing that it is unwise to allow the polluter to conduct the response action without independent oversight.<sup>298</sup> However, granting DoD lead agency status does not amount to a grant of unbridled discretion. The lead agency must still consult with EPA,<sup>299</sup> the lead agency must allow for meaningful participation by state and local authorities,<sup>300</sup> and a state or citizen can seek limited judicial review during the cleanup process and judicial review after the remedial action is complete.<sup>301</sup> By vesting response authority in the President (and allowing him to delegate that authority), and through the NCP concept of a "lead agency", a balance was struck that favored expeditious response without eliminating independent oversight. One is reminded of the adage that "too many cooks spoil the broth". The same is true of environmental cleanup actions. As the court noted in *United States v. Seymour Recycling Corp.*,<sup>302</sup> the selection of a cleanup remedy involves a consideration of environmental standards as well as economic and policy considerations. That selection should be made by the executive agency best

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<sup>297</sup>(...continued)

integration. First, DoD, not EPA, has been delegated the President's CERCLA response authority for releases on or from DoD facilities. EPA has recognized that authority by listing DoD as the lead agency for such releases in the NCP. Second, the emphasis in CERCLA is on an expeditious response action. As recognized in the unitary executive theory, someone must have the authority to resolve a dispute or decide an issue in order to prevent gridlock. Unreasonable delays from protracted negotiation and litigation are avoided by allowing the lead agency resolve any RCRA/CERCLA overlap disputes.

<sup>298</sup>See, e.g., Karen R. Breslin, *Colorado Case Turns on Jurisdiction Over Hazardous Waste Cleanup*, 21 Environment Reporter (BNA) 523 (July 20, 1990);

<sup>299</sup>40 C.F.R. §300.5.

<sup>300</sup>CERCLA sections 120(f) & 121(f), 42 U.S.C. §§9620(f), 9621(f).

<sup>301</sup>A challenge can be brought to a removal or remedial action if it falls under one of the five exceptions to the CERCLA section 113(h) jurisdictional bar. 42 U.S.C. §9613(h). Furthermore, if a federal lead agency proposes a remedial action that does not attain a "legally applicable or relevant and appropriate standard" and the state does not agree with the selected remedial action, the state can bring an action in the appropriate federal district court to have the remedial action conform to that standard. If the state can establish, based on the administrative record, that the lead agency's selection was not based on "substantial evidence", then the remedial action must be modified to meet the standard. 42 U.S.C. §9621(f)(3).

<sup>302</sup>679 F.Supp. at 862.

suited to make such a judgment. In the realm of environmental cleanup actions at DoD facilities, with the competing interests of environmental protection and national security, that decision is best entrusted to DoD.

### C. Federal Preemption

At federal facilities located in states which have not been delegated RCRA authority by EPA, the issue of whether to conduct a cleanup action under RCRA or CERCLA (or how to integrate the two statutes) involves a comparison of these two federal statutes. When this issue arises at federal facilities located in states that have been delegated RCRA authority, like Colorado, federal preemption of state law also becomes an issue.<sup>303</sup>

The starting point for a preemption analysis is the Supremacy Clause of the Constitution, which establishes the Constitution and the federal laws as the "supreme Law of the Land".<sup>304</sup> Preemption may be express or implied. Express preemption involves an express statement of intent in the Constitution or by the Congress to protect a federal program or statute from

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<sup>303</sup>As Professor Manus observes, delegation of RCRA authority does not make Colorado an agent of the federal government. Manus, *Federalism under Siege*, *supra* note 18 at 339-340. This brief examination of preemption is based primarily on the following sources: Manus, *Federalism under Siege*; *Lawmaker as Lawbreaker*, *supra* note 283; *California Coastal Comm'n. v. Granite Rock Co.*, 480 U.S. 572 (1987)(Powell, J., concurring in part and dissenting in part). While sovereign immunity is a related issue, it is too tangential to this discussion since it focuses on application of state law to the federal government. The focus of this paper is on the assertion of federal control over a federal interest that may also be a state interest. See Manus, *Federalism under Siege*, *supra* note 18 at 340. For discussions of the issue of sovereign immunity under federal environmental laws, see Hourcle, *Federal Facilities*, *supra* note 297; Millan, *Federal Environmental Compliance*, *supra* note 24.

<sup>304</sup>U.S. Const. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

interference from other federal or state programs.<sup>305</sup> CERCLA fails to provide an express statement of intent to preempt all other federal or state programs regarding environmental protection. Instead, there are provisions that assert plenary federal control under CERCLA, and savings clauses that indicate an intent not to preempt other federal statutes and state statutes.<sup>306</sup>

Implied preemption occurs in situations in which compliance with both federal and state law would be impossible or impractical. Federal preemption may be implied where a federal program so "occupies the field" as to permit the reasonable inference that Congress intended the federal program to preempt other federal and state laws.<sup>307</sup> Implied preemption can also be found where the state law hinders or blocks the federal program at issue.<sup>308</sup> Implied federal

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<sup>305</sup>Manus, *Federalism under Siege*, *supra* note 18 at 341-48. In *California Coastal Comm'n v. Granite Rock Co.*, the Supreme Court explained express preemption as follows: "[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190,] 203-204 [(1983)]; *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U. S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)." 480 U.S. at 581.

<sup>306</sup>See discussion of CERCLA provisions, *supra* in Part III.A.

<sup>307</sup>See Manus, *Federalism under Siege*, *supra* note 18 at 348-59 (quoting the Supreme Court in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 603 (1991) (describing such a comprehensive program as "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."). Professor Manus cites *International Paper Co. V. Ouellette*, 479 U.S. 481 (1987), as a case in which the Supreme Court explained that implied preemption could be found in a statute establishing a comprehensive national pollution control program, despite the existence of a savings clause in the statute. Manus, *Federalism under Siege*, *supra* note 18 at 350. The use of the word "Comprehensive" in CERCLA's title, and the ARARs provisions in CERCLA section 121 limiting state participation and precluding independent state action, also support a finding of implied preemption in the statute. See CERCLA section concerning preemption, *supra* at page 33; Manus, *Federalism under Siege*, *supra* note 18 at 352-59 (and cases cited therein). In *California Coastal Comm'n v. Granite Rock Co.*, the Supreme Court explained implied preemption as follows: "If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)." 480 U.S. 572, 581 (1987)(quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

<sup>308</sup>Manus, *Federalism under Siege*, *supra* note 18 at 360-67. As discussed above in Part II, requiring cleanup actions at federal facilities to comply with both CERCLA and RCRA, or with both CERCLA and state laws, hinders expeditious cleanup through increased cleanup costs and delays due to negotiations with state authorities. Prompt cleanup is the primary goal of CERCLA, as evidenced by the legislative history and the jurisdictional bar erected by  
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preemption under CERCLA is supported by the practical aspects of conducting a national program of environmental protection,<sup>309</sup> the Congressional intent behind CERCLA of enacting a program for expeditious responses to hazardous substance releases,<sup>310</sup> and the CERCLA provisions indicating Congress' intent to preempt.

Finally, preemption may be found where presidential authority is delegated to a federal agency and where Congress has given the agency the duty to develop the regulations and guidelines necessary to implement a legislative objective.<sup>311</sup> The President has delegated his CERCLA response authority at DoD sites to the Department of Defense, as discussed below. Congress has also directed DoD to "carry out a program of environmental restoration" at DoD facilities.<sup>312</sup> DoD, obviously, is also charged with providing for the national defense. Thus, DoD must accommodate the often conflicting policies of national defense and environmental restoration. By implication, Congress must have intended that the policies determined by DoD in implementing these constitutional and legislative goals should preempt any other federal or

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<sup>308</sup>(...continued)

section 113(h). Since concurrent state authority is an obstacle to that goal, preemption should be implied.

<sup>309</sup>See S. Rep. No. 848, 96th Cong., 2d Sess. 16, *supra* note 63.

<sup>310</sup>*U.S. v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1416-18 (6th Cir.1991); *Southern Pines Association v. U.S.*, 912 F.2d 713, 716 (4th Cir.1990).

<sup>311</sup>*Manus, Federalism under Siege*, *supra* note 18 at 367-72. This "administrative preemption" is similar to the above two types of implied preemption in that it infers a Congressional intent of preemption from the policies and programs the agency is charged to implement and manage. Thus, agency regulations, if consistent with the governing statute, preempt any conflicting federal or state laws that threaten to hinder the agency's program or frustrate its purpose. *Id.* Preemption analysis in this situation should focus on the "proper bounds of [the federal agency's] lawful authority to undertake [the action at issue]." *New York v. FCC*, 486 U.S. 57, 64 (1988). The Supreme Court seems to be reluctant to disturb agency preemption of state or local law "if the agency's choice to preempt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute,...unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" 486 U.S. at 64 (quoting *U.S. v. Shimer*, 367 U.S. 374, 383 (1961)).

<sup>312</sup>10 U.S.C. §2701, Defense Environmental Restoration Program (DERP).



state laws that conflict with DoD achieving the Congress' assigned goals.

Pursuant to Executive Order 12,580, DoD has been delegated the President's CERCLA response authority. That authority has been recognized in the NCP regulations. Congress reinforced that delegation by directing DoD to implement a program of environmental restoration, the Defense Environmental Restoration Program, under 10 U.S.C. §2701. Granting authority to multiple agencies and governmental entities at a single cleanup site frustrates the environmental cleanup objective that Congress and the President have entrusted to DoD.<sup>313</sup> Allowing DoD to exercise the plenary control delegated to it by the above authorities and to preempt conflicting federal and state laws as appropriate will prevent the disruption of the balance struck by DoD between two important federal interests, and will avoid an "intolerable conflict in decision making."<sup>314</sup>

#### **D. EPA Policies Favor Integration**

As the federal agency entrusted with the task of acting as the federal government's environmental watchdog, EPA must balance the often conflicting policies found in the environmental statutes enacted by Congress. Given the complexity and the potential conflicts between the RCRA and CERCLA regimes, it is not surprising that EPA strives to take a practical approach by emphasizing cleanup rather than strict procedural compliance with either

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<sup>313</sup>See discussion concerning the delays and added costs associated with duplicative and overlapping state requirements at federal facility cleanup sites, *supra* in Part II at page 8. In addition, Congress has already provided for the participation of state and local governments in the CERCLA process in CERCLA sections 120(f) and 121(f), and for the participation of EPA in CERCLA section 120(e)(2). There is no reason to add duplicative state and federal requirements. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. at 604-606 (Powell, J., concurring in part and dissenting in part).

<sup>314</sup>*Granite Rock Co.*, 480 U.S. at 606.

statute. In considering the "substantive consistency"<sup>315</sup> of the two regimes, one wonders why we need both regimes.<sup>316</sup>

Despite the conflicting and confusing statutory structure Congress has erected governing hazardous waste management, EPA seems to be striving to focus on actual cleanup as the bottom line in EPA's enforcement of RCRA and CERCLA.<sup>317</sup> This year EPA is developing guidance on the integration of RCRA and CERCLA in cleanup decision making in order to "eliminate redundancy in cleanup oversight and speed the cleanup process."<sup>318</sup> The new guidance is expected to advocate the concept of parity between the two statutory frameworks, essentially rendering the two programs equivalent.<sup>319</sup>

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<sup>315</sup>Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,852 (1990) (to be codified at 40 C.F.R. Parts 264, 265, 270, and 271).

<sup>316</sup>Perhaps there is a lesson to be learned from the Canadian Environmental Protection Act (CEPA). R.S.C., Ch. 16 (4th Supp. 1989). The CEPA, enacted in 1988, implements a "comprehensive 'cradle-to-grave' regulation of toxic substances." In the interests of efficiency and uniformity, similar environmental statutes relating to natural resources and environmental protection were also consolidated under one statute. Note, Vincent P. Fiore, *Federal Wetlands Regulation in Canada and the United States: Suggestions for Canada in Light of Crown Zellerbach and the Peace, Order and Good Government Clause of the Canadian Constitution*, 27 George Washington J. Int'l. L. & Econ. 139, 156 n.115 (1993).

<sup>317</sup>Other evidence of this pragmatic approach emphasizing cleanup results over procedure is EPA's Common Sense Initiative (CSI). Organized as an "integrated set of industry-sector pilot projects organized under the Federal Advisory Committee Act", CSI has been described as being based on "stringent environmental goals" but flexible in terms of the means available to meet those goals. Letter from Stephen F. Harper, Director of CSI, in the Readers' Forum, 12 THE ENVIRONMENTAL FORUM, May/June 1995, at 3. One would hope that CSI will support the efforts to integrate RCRA and CERCLA in practical way at all cleanup sites, including sites located at federal facilities.

<sup>318</sup>*EPA Crafts New Guidance to Harmonize RCRA and Superfund Cleanups*, 16 INSIDE EPA, July 7, 1995, at 1. One EPA source quoted in the article noted that RCRA section 1006, 42 U.S.C. §6905, provided support for the integration of the programs. RCRA section 1006(b)(1) states that "[t]he Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act, the Federal Water Pollution Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection." (Statute citations omitted).

<sup>319</sup>*Id.* at 8. In developing the RCRA/CERCLA integration guidance, EPA is looking to the parity policy developed in EPA Region 10. That policy defines "parity" as "mean[ing] that a site-specific decision under one  
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Another aspect to this pragmatic approach is the objective of reducing duplication of effort. In proposing its policy of deferring willing and financially able sites to RCRA Subtitle C Corrective Action authorities, EPA explained that this policy will have the benefits of reducing duplicative oversight resources and authorities, as well as making CERCLA oversight resources and authorities available for sites CERCLA was intended to cover, i.e., abandoned sites with uncontrolled releases.<sup>320</sup>

In a later Notice of Policy Statement regarding this deferral policy, EPA stated that another benefit of the policy is that it would avoid “the need for an owner/operator to follow more than one set of regulatory procedures.”<sup>321</sup> EPA recognized in that notice that a system allowing two separate authorities to regulate a cleanup action creates confusion over which authority governs. In adopting the deferral policy, EPA also explicitly stated that switching statutory horses in mid-stream is consistent with both RCRA and CERCLA since both have “comparable cleanup goals”.<sup>322</sup>

EPA’s RCRA deletion policy, however, does not pertain to federal facility sites. For

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program will be considered equivalent to a decision under the other program.” EPA Region 10 Memorandum, *RCRA/CERCLA Interface - Interim Final Guidance*, August 3, 1994. The Region 10 guidance is based on the recognition that “either program will produce substantially equivalent cleanup outcomes.” Under the Region 10 parity guidance, for example, RCRA usually would not be able to recheck or re-open “unit-specific decisions” made under CERCLA. *Id.* at 2.

<sup>320</sup>Deletion of Sites from NPL to Defer to RCRA, 59 Fed. Reg. 21,042, 21153 (1994) (to be codified at 40 C.F.R. Part 300). EPA’s criteria for such sites is that they be progressing well under RCRA Subtitle C and the deletion of the site from the NPL would not disrupt on-going cleanup activities.

<sup>321</sup>The National Priorities List for Uncontrolled Hazardous Waste Sites; Deletion Policy for RCRA Facilities (Notice of Policy Statement), 60 Fed. Reg. 14,641, 14,642 (1995)(to be codified at 40 C.F.R. Part 300).

<sup>322</sup>*Id.* Of course, such a deferral must meet the criteria listed in the EPA policy and must not interfere with the remediation of the site.

such sites, EPA relies on IAGs to alleviate any duplication of effort or redundancy problems.<sup>323</sup> Treating federal facilities differently simply on the basis of non-eligibility for Superfund-financed remedial action, however, ignores the other reasons for the deferral policy. EPA's reliance on IAGs may also be misplaced. As discussed above in Part II, IAGs often provide little solace to DoD because of the time required to negotiate them. In addition, IAGs seldom alleviate the uncertainty of guessing which authority has primacy since the players and policies may change for facilities located in different states and different EPA regions. This uncertainty hinders an effective and prompt response to a release, and it hinders the development and implementation of the national strategy that is needed if large federal agencies like DoD are to use their environmental restoration resources most effectively.

Other past guidance and policy statements from EPA also reflect a pragmatic and flexible approach. For example, in a recent proposed rule covering post-closure care under RCRA, EPA proposed an amendment to 40 C.F.R. §270.1(c) that would allow the use of "alternative legal authorities" to address post-closure care requirements.<sup>324</sup> Under this proposal, EPA "would have the discretion to impose [post-closure care] conditions through a permit, a RCRA enforcement authority, a Superfund authority, or a combination of these or other legal authorities."<sup>325</sup> EPA emphasized that the focus of such actions should be compliance with the substantive standards,

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<sup>323</sup>*Id.* (citing The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities, 54 Fed. Reg. 10,520, 10,522 (1989)).

<sup>324</sup>Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-Closure Permit Requirements; Closure Process; State Corrective Action Enforcement Authority, 59 Fed. Reg. 55,778, 55,783 (1994).

<sup>325</sup>*Id.*

“not that a specific regulatory authority be used to impose these standards.”<sup>326</sup>

Functional equivalence, applied by federal courts to integrate NEPA requirements with RCRA and CERCLA for EPA actions, is analogous to this concept of parity.<sup>327</sup> Judicial acceptance of the functional equivalence of RCRA and NEPA for EPA actions<sup>328</sup> supports the argument that such flexibility is acceptable and was intended by Congress in the area of environmental cleanup. Functional equivalence, like parity, emphasizes compliance with substantive cleanup standards, rather than strict adherence to a specific procedural framework.

Further indications of EPA’s acceptance of parity in the area of hazardous substance cleanup were present in the proposed rule for RCRA corrective action in the summer of 1990. EPA stated that the objective of the corrective action program is “substantive consistency with the policies and procedures of the [CERCLA] remedial action program.”<sup>329</sup> EPA explained then that the RCRA corrective action process would parallel the CERCLA remedial action process, although procedurally the two processes might differ. However, EPA expected the two programs to “arrive at similar solutions to similar environmental problems,” and expected “actions undertaken by one program [to be] adopted by the other program in cases where the programmatic responsibility for a site shifts from one to the other.”<sup>330</sup>

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<sup>326</sup>*Id.* In another section of this proposed rule, addressing corrective action as an alternative to a post-closure permit, EPA did not specify what authorities could be used to impose the corrective action. EPA only required consistency with RCRA corrective action requirements. Thus, EPA opined that if a federal Superfund action is underway at a facility, and the action addresses all releases at the site, “issuance of a post-closure permit should be unnecessary.” 59 Fed. Reg. at 55,784.

<sup>327</sup>*See* NEPA discussion, Part III.E. *supra* note 262.

<sup>328</sup>*Id.*

<sup>329</sup>55 Fed. Reg., *supra* note 315, 329, at 30,852-53.

<sup>330</sup>*Id.*

**E. Should Federal Facilities Be Treated the Same as Non-Governmental Entities?**

Federal facilities are not the same as non-governmental entities and should not be treated exactly the same. Treating them the same as non-governmental entities, even though they are not, can lead to dysfunctional results. In the wake of the passage of enhanced sovereign immunity in the FFCA<sup>331</sup> and the decision in *United States v. Colorado*,<sup>332</sup> one commentator concluded that it should be clear that Congress expects the federal government to “manage its hazardous wastes with the same degree of care as a similarly situated private person.”<sup>333</sup> But what does this mean? Does it mean that the *exact* same rules *and* procedures should apply to federal facilities and private entities when they conduct cleanup actions? Or does it mean, as this paper maintains, that equivalent substantive standards should be applied to federal facilities and private entities, but that the same procedural requirements need not be applied? In other words, why should we treat federal agencies the same as a private entity when they pollute? Federal agencies are fundamentally different in terms of who runs them, how they obtain and allocate funds, and to whom they are ultimately accountable. Given the unique and far-reaching policy

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<sup>331</sup>Pub. L. No. 102-386, 106 Stat. 1505 (1992).

<sup>332</sup>990 F.2d 1565 (10th Cir.1993).

<sup>333</sup>Glicksman, *Pollution on Federal Lands III*, *supra* note 124 at 68. Obviously, federal agencies should manage hazardous wastes with “the same degree of care” as everyone else. However, for the reasons discussed below, federal agencies should not be required to follow the exact same procedures in managing hazardous wastes. Overriding concerns, such as national security, may also justify different substantive cleanup standards for DoD and DoE. Congress recognized this need to treat federal agencies differently, for instance, by including a national security exemption in CERCLA section 120(j). 42 U.S.C. §9620(j). As discussed below, federal facilities and private parties are seldom, if ever, similarly situated. Also, the FFCA provides little solace in the CERCLA universe as it only waives sovereign immunity under RCRA, as noted *supra* at page 60. Finally, *United States v. Colorado* lends limited support to the argument that federal facilities must be treated *exactly* the same as their private counterparts. That case seems only to have been followed in the First Circuit. As noted above in Part III.A, a majority of the federal circuits interpret the section 113(h) bar much more broadly and therefore view CERCLA authority as preeminent at a CERCLA site. CERCLA preeminence at a federal facility cleanup supports the argument advanced by this paper that a CERCLA cleanup at a DoD facility should be treated differently from a CERCLA cleanup at a private facility, in part because DoD is granted broad lead agency powers under CERCLA section 104, Executive Order No. 12580, and the NCP.

considerations involved in federal facility cleanups, as well as the unique constraints under which federal facilities operate, federal facilities and private entities are seldom “similarly situated”. For the reasons discussed below, federal facilities cannot and should not be subject to the same procedural requirements as private entities.

It is obvious that federal agencies are not above the law in terms of the prohibitions against releasing hazardous substances into the environment. However, this does not necessarily mandate that the federal government (or state governments for that matter) treat DoD and IBM exactly the same with regards to environmental cleanup actions. Actually, despite CERCLA section 120(a)(1), which states that federal agencies must comply with CERCLA to the same extent as non-federal entities, and other specific waivers of sovereign immunity, federal agencies are not treated the same as private entities under CERCLA.

For example, under EPA’s proposed state deferral guidance for cleanup sites, federal facilities are not eligible for the deferral.<sup>334</sup> Generally, Superfund monies are not available for remedial action with respect to federally-owned facilities.<sup>335</sup> Non-NPL federal facility sites must follow state removal and remedial action requirements as long as such requirements are not more stringent than those applied to non-federal entities.<sup>336</sup> However, CERCLA section 120(a)(2) requires any such cleanup action to be not inconsistent with U.S. EPA guidelines and rules. Non-federal entities are not required to be consistent with EPA requirements when following

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<sup>334</sup>60 Fed. Reg., *supra* note 321, at 14,642; *Superfund: State Role, Liability, Cleanup Guidance Among Major Reforms Announced by EPA*, Daily Environment Report (BNA), May 26, 1995, at AA-1.

<sup>335</sup>CERCLA section 111(e)(3), 42 U.S.C. §9611(e)(3).

<sup>336</sup>CERCLA section 120(a)(4), 42 U.S.C. §9620(a)(4).

state laws.<sup>337</sup>

Proponents of a larger state role in Superfund cleanup also proclaim their intent to treat federal facilities the same as non-governmental entities under CERCLA. In reality, however, federal agencies end up being treated differently in some key respects. For example, the proposal of Senator Bob Smith's (R-NH) would virtually turn over all CERCLA authority to the states. It also would eliminate retroactive liability for all polluters who polluted before 1980 -- except, of course, the federal government.<sup>338</sup>

There are several arguments in favor of treating federal facilities the same as their private sector counterparts. First, the federal government should lead the way in environmental compliance. This would set the example for private industry and encourage compliance throughout the nation. But to do so, the federal government must operate under the same rules. Second, proponents argue that this approach would deter pollution by federal agencies. This was a key factor in the passage of the Federal Facility Compliance Act of 1992.<sup>339</sup>

However, the arguments in favor of treating federal agencies the same as private sector polluters are outweighed by the following arguments against such a policy. Basically, federal

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<sup>337</sup>Hourcle, *Subpart K*, *supra* note 5 at 404 n.7.

<sup>338</sup>See Sen. Smith Proposal, Daily Environment Report (BNA), June 30, 1995, *supra* note 59. Sen. Smith's proposal regarding retroactive liability is as follows: "A. Repeal Retroactive Liability for Pre-1981 Disposal -- Amend section 107 to provide that no person shall be held liable for the removal or response costs related to hazardous substance disposal at non-federal NPL sites that occurred prior to December 11, 1980. Such costs shall be paid from the Hazardous Substance Superfund ("the Fund"). For those sites where disposal occurred both prior to and after December 11, 1980, the fund would utilize an independent allocator who would apportion the liability for the pre- and post-1980 disposal. Such allocator would also determine the proportionate level of liability for post-1980 disposal as is described below. Retroactive liability repeal would not apply to federal liability that occurred at nonfederal facility NPL sites. This retroactive repeal program would include a mechanism to ensure that PRPs remain on the site to conduct the cleanup program." This type of proposal seems to shift the entire cost of cleanup for pre-1980 disposal/contamination to the federal government. EPA Administrator Browner criticized this aspect of Sen. Smith's proposal in a letter dated July 11, 1995. *Letter from EPA Administrator Browner to Sen. Smith on Superfund Reform Proposal*, Daily Environment Report (BNA), 1995 DEN 133 d39 (Lexis), July 12, 1995.

<sup>339</sup>Darmody, *Hazardous Waste Law*, *supra* note 24, 160 at 652-653.



agencies are not the same and therefore cannot be treated exactly the same way as private polluters.

- ▶ First, federal agencies operate under different fiscal constraints than their private sector counterparts. The Appropriations Act and Anti-Deficiency Act prevent expenditures unless Congress has appropriated funds for such expenditures.<sup>340</sup> Even though funds for a cleanup are paid out of a federal agency's budget, the public is really paying, unlike the situation when a private corporation pays for the cleanup.
- ▶ Second, competing interests are involved more directly in federal facility cleanup actions than in cleanups at private sites. When the federal government imposes environmental regulations on private entities, the policy interests mainly involve cleanup of past pollution and prevention of future pollution. In the national scheme, the effect of such regulations on the operations (and even on the economic survival) of private entities is a factor, but it is not always dispositive. However, when the federal government imposes environmental regulations on itself, environmental interests must be balanced against other national welfare concerns, such as national security.
- ▶ Third, the complexity and scope of pollution is different at federal facilities. In terms of the remediation technology required and the types of contaminated sites, DoD sites are similar to those found in the private sector.<sup>341</sup> However, DoD sites with buried ordnance,

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<sup>340</sup>See Part II.D, *supra*, discussing funding constraints for federal agencies; 58 Fed. Reg. *supra* note 217 at 49,045 n.5 ("Because the Anti-Deficiency Act, 31 U.S.C. 1341, makes payments by federal agencies subject to the appropriation funds by Congress, there might be unique payment issues that arise with regard to payment of [RCRA civil and administrative] penalties by such agencies....If the Federal agency demonstrates that it cannot pay due to the Anti-Deficiency Act, the (EPA) Regions should require that the particular Federal agency agree to request additional funds from Congress.").

<sup>341</sup> CBO, CLEANING UP DEFENSE INSTALLATIONS, *supra* note 1 at viii, 9-10. The report notes that the 10 most common types of contaminants found at DoD sites are: petroleum/oil/lubricants, solvents, heavy metals, paint, (continued...)

explosive chemicals, or mixed waste pose special problems not generally encountered in the private sector.<sup>342</sup> DoD is also distinguishable by the sheer size of the cleanup task it faces.<sup>343</sup> DoD sites are scattered across the country. Treating DoD like a private entity means state environmental laws apply. State control means DoD must operate under different rules at sites located in different states, even though the problems at the different sites may be similar.<sup>344</sup> It also means that it will be that much harder -- and that

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<sup>341</sup>(...continued)

ordnance components, polychlorinated biphenyls (PCBs), acid, refuse without hazardous waste, explosive chemicals, and pesticides. *Id.* at 10, Table 2. These contaminants are similar to those found at civilian sites. The types of contaminated sites are also similar to those found in the civilian sector. Common types of sites in DoD are contaminated storage sites, underground storage tanks (USTs), landfills, spill areas, waste treatment plants, burn areas, and training areas for firefighting and aircraft accidents. Most of these types of sites can be cleaned up using the same technologies used at civilian sites. *Id.* at 9.

<sup>342</sup>*Id.* at 10-12. These contaminants are rarely found in the civilian sector. DoD reports about 220 sites with unexploded ordnance and munitions, 268 sites with explosive and ordnance disposal areas, and about 130 sites with low-level radioactive waste or mixed waste. Almost 1,700 sites containing unexploded ordnance and chemical warfare materials have been identified by the U.S. Army Corps of Engineers. While sites containing these contaminants are less numerous than sites containing more common contaminants, they do "constitute a major challenge" since they may require the development of new remediation technologies. *Id.* at 10. For example, identification and remediation of buried ordnance sites requires surveys using hand-held metal detectors, specially protected equipment must be used to dig up and transport the ordnance, and the ordnance must then be de-armed or exploded. The process is time-consuming and costly -- DoD estimates the cost per acre at about \$65,000 for survey and remediation. Currently, the Corps of Engineers estimates that "tens of thousands of acres" require such remediation. Cleanup costs for buried ordnance and chemical warfare materials are estimated at several billion dollars. *Id.* at 10-11. Obviously, sites containing low-level radioactive waste or mixed waste represent special problems in handling and treatment of the waste. Using current technology, DoE estimates that cleanup costs for this type of contaminant range from \$14,000 to \$26,000 per cubic meter. *Id.* at 12.

<sup>343</sup>See above, Section II.A, describing the scope of the cleanup required at DoD facilities.

<sup>344</sup>Eaton, *Creating Confusion*, *supra* note 53 at 142-143. State requirements may be different from federal hazardous substance requirements. For example, Texas puts additional restrictions on injection wells and transporters of oil and gas drilling waste. *Id.* (citing the Injection Well Act, Texas Code Ann. Title 2, §§ 27.001-27.105 (1988 & 1994); Oil and Gas Waste Haulers Act, Texas Code Ann. Title 2, §§29.001-29.053 (1994)). Under New Mexico law, substances covered by several federal pollution control laws are exempt from state law. *Id.* (citing the Hazardous Waste Act, New Mexico Statutes Ann. §§74-4-1 -- 74-4-14 (1993)). Mr Eaton notes that "[t]his creates a situation where CERCLA responsible parties face the prospect of being brought into federal court on federal claims -- that is, the CERCLA and the RCRA -- and an entirely separate battle over state hazardous waste laws in state courts. Transaction costs multiply each time responsible parties are required to appear in court to determine cleanup standards. Both the government and private parties pay for such a complex scheme." *Id.* The transaction costs involved include not only the costs of litigation, but also the resources and man-hours invested by federal employees to learn the different state rules and to negotiate with state agencies and officials concerning cleanup actions. *Id.* (citing Peter H. Schuck, (continued...))

much more expensive for the taxpayer -- for DoD to develop a national strategy for addressing environmental restoration.

- ▶ Fourth, environmental restoration conducted by a federal agency diminishes that agency's ability to perform its primary mission. Congress and the President should understand that any mandate to a federal agency to perform environmental restoration constitutes such a policy choice. This choice between environmental restoration and accomplishment of the mission is of paramount significance for DoD. In a time of increasing environmental restoration costs and defense budget reductions, the environmental restoration obligations imposed on DoD will affect our military capabilities.<sup>345</sup> Despite the downsizing of the military, the sheer size of the defense budget continues to attract Congressional projects like environmental restoration.<sup>346</sup> While the military may perform well in "difficult but less demanding" non-traditional roles, the potential adverse consequences of such a policy are serious. One former DoD official warned that "[t]he moment [non-traditional] missions become the military's purpose--or even its partial aim--the dangers and stress of combat will cease to guide our armed forces' training. The

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<sup>344</sup>(...continued)

*Legal Complexity: Some Causes, Consequences, and Cures*, 42 Duke L.J. 1, 18 (October 1992)). Mr Eaton concludes that these added transaction costs are not justified since they only result in slower, not better, cleanups. *Id.*

<sup>345</sup>See Charles J. Dunlap, Jr., *The Last American Warrior: Non-Traditional Missions and the Decline of the U.S. Armed Forces*, 18 Fletcher Forum of World Affairs 65 (Winter/Spring, 1994). In this article, Col. Dunlap argues that use of the military for non-military tasks such as drug interdiction, humanitarian assistance, and environmental restoration, may have disastrous long-term consequences for national security. Quoting the Supreme Court in *United States v. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), he notes that the traditional mission of the military is "to fight or be ready to fight wars should the occasion arise." *Id.* at 66. In essence, he argues that non-military roles reduce the time and resources devoted to combat training, with the resultant diminishing of combat capability. This addition of roles, and the concomitant dilution of the combat role, in Col. Dunlap's view, is more threatening than a simple downsizing of military forces.

<sup>346</sup>*Id.* at 79 (citing Peter Orier, *Ask for Pentagon Funding*, Christian Science Monitor, October 18, 1993, at 1).

military will still wear uniforms, march, and look like a force to be reckoned with, but the edge honed by war's realities will be lost.... A larger military that is uncertain about its fundamental purpose will be harder to reconstitute as an effective fighting force than a smaller one that knows exactly why it exists and what it is supposed to do.”<sup>347</sup>

Generally, then, federal agencies should be held to the same standards as any non-governmental entity in terms of compliance with laws prohibiting or regulating the release of hazardous substances into the environment. However, attempts to treat federal agencies *exactly* the same as non-governmental agencies ignore the unique constraints under which federal agencies must operate, and ignore the tradeoffs such “equal treatment” would require. In the context of DoD environmental restoration, such a policy diminishes the effectiveness of our military forces in two ways. First, as described above, DoD resources devoted to environmental restoration are resources taken from military training and readiness. Second, treating DoD like IBM subjects the DoD budget and policy decisions to control by EPA, as well as state and local governments that are not charged with the national defense mission.<sup>348</sup> If DoD is to continue to provide for the national defense, then it should not be treated like a non-governmental entity under CERCLA or RCRA.

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<sup>347</sup>*Id.* at 81 (quoting Former Deputy Under Secretary of the Navy Seth Cropsey, *Searching for Nontraditional Roles: Trade-off or Sellout?* Proceedings (August 1993) at 77).

<sup>348</sup>See discussion *supra* Part II.B; *infra* Part IV.F.

## F. The Case Against State Control.

Most of the recent proposals to reform Superfund advocate delegation of greater authority to states under CERCLA.<sup>349</sup> Greater state authority in cleanup actions at private facilities may be advantageous.<sup>350</sup> Proponents of greater state authority argue that it would move the cleanup process closer to affected communities; that it may reduce multilayered bureaucratic studies and reviews; that it may be faster and more productive; and that state authority would easily fit into existing state "mini-superfund" laws.<sup>351</sup> Many proponents of state control,

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<sup>349</sup>See, e.g., Sen. Smith's proposal, *supra* note 59; *Superfund: Oxley Issues Reform Principles; Some Differences from Smith Plan*, Daily Environment Report (BNA), July 18, 1995, at AA-1 (Sen. Oxley's would give qualified states the authority to lead cleanup actions at federal sites.); H.R. 228 (Superfund Reform Bill), 104th Cong., 1st Sess. (Introduced January 4, 1995; Version 1, January 14, 1995) §615 (requiring federal facilities to comply with state and local requirements, both substantive and procedural).

<sup>350</sup> The difference between 'state control' and 'state participation' should be emphasized. 'State control', as used in this paper, means the state is able to dictate the nature and pace of the cleanup through a veto power, a requirement for unanimous consent by all parties, or as lead agency. 'State participation' is used in this paper to describe a state role similar to that already in CERCLA [sections 120(f) and 121(f)]: for example, the opportunity to comment on proposed remedies or to propose ARARs. This paper argues against state *control* of cleanup actions at federal facilities, but not against state *participation* in the cleanup process. One federal court explained that CERCLA "provides a substantial and meaningful role for the individual states in the selection and development of remedial actions to be taken within their jurisdictions." *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1418 (6th Cir.1991). The court noted that the state in that case was given "a reasonable opportunity to comment on the RI/FS, the RAP [remedial action plan] proposed in the amended ROD [Record of Decision], and other technical data related to the implementation of the proposed remedy." *Id.* The state is also able to participate in settlement negotiations and to challenge a proposed remedy in which the federal agency has waived a valid state ARAR. *Id.*; CERCLA sections 121(d)(4) and 121(f)(2)(B), 42 U.S.C. §§9621(d)(4), 9621(f)(2)(B). Under CERCLA section 121(e)(2), a state may enforce a federal or state standard that has not been waived by the federal agency. *Akzo Coatings*, 949 F.2d at 1418. States should be afforded opportunities to raise local concerns, comment on proposed remedies, or propose reasonable standards for cleanup. If DoD or any federal agency is to implement an effective national cleanup program, however, states should not be allowed to dictate the nature and the pace of the cleanup actions at individual sites.

<sup>351</sup>Ridgway M. Hall, Jr., *What Will Superfund Reauthorization Look Like?* Environment Reporter - Current Developments (Analysis and Perspective), May 19, 1995, at 236 [hereinafter Hall, *Superfund Reauthorization*]. Mr. Hall cites a joint study by EPA and the Association of State and Territorial Solid Waste Management Officials, *A Report on State/Territory Non-NPL Hazardous Waste Site Cleanup Efforts for the Period 1980-1992* (July 1994). That study reported that states completed 3,527 removal actions, 2,689 remedial actions, and reported about 11,000 sites in the process of remediation during that 12-year period. During the same period, EPA completed 2,365 removals, 155 remedial actions, and reported 9,134 sites between preliminary assessment and remedial action. The report indicates "significant state accomplishments", but Hall also correctly noted that "the non-NPL sites addressed by states are generally less complex, less contaminated, and easier to clean up." Environment Reporter at 237. See also, *Superfund: State Officials Urge State Control; EDF Attorney Says Federal Control Better*, Environment (continued...)

however, do not want full responsibility for the Superfund program. The state representatives testifying before one Senate panel this spring wanted state control of the program, yet they agreed that the federal government should continue to be responsible for emergency response programs, technical assistance and training, initial development of cleanup standards, and funding where states do not take the lead.<sup>352</sup> Opponents of increased state authority caution that it may consist of unfunded mandates; that states possess inadequate resources to administer an effective superfund program; that EPA must be willing and able to "take back" a site or a program if the state does a poor job (this requires EPA oversight).<sup>353</sup> In addition, greater state control may result in a more decentralized regulatory system, hindering the development of an integrated system for dealing with hazardous substance releases.<sup>354</sup>

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Reporter - Current Developments (BNA), May 12, 1995, at 187 [hereinafter *State Officials Urge State Control*] (In testimony before the Senate Environment and Public Works Subcommittee on Superfund, Waste Control, and Risk Assessment on May 4, 1995, state representatives argued that state control of Superfund was needed because state officials are more familiar with the state's needs and capabilities, states have better relationships with PRPs than does the EPA, states have a vested interest in the cleanup of sites within the state, and are therefore better suited to determine cleanup remedies than are federal officials. State representatives also argued that state control would reduce the inefficient duplicative layers of decision making in the present system.).

<sup>352</sup>*State Officials Urge State Control*, *supra* note 351 at 187-188.

<sup>353</sup>Hall, *Superfund Reauthorization*, *supra* note 351; *Letter from EPA Administrator Browner to Sen. Smith on Superfund Reform Proposal*, Daily Environment Report (BNA), 1995 DEN 133 d39 (Lexis), July 12, 1995 (noting that adequate funding is often an obstacle to state assumption of CERCLA cleanup responsibilities. Browner also argued that delegation to the states "would prevent EPA from ensuring national consistency and adequate protection of human health and the environment."); *State Officials Urge State Control*, *supra* note 351 at 188 (an Environmental Defense Fund attorney testified against state control, arguing that it would result in slower cleanups of poorer quality and less public participation, it would be inefficient and costly due to the diversity of state programs, and it would result in less protection for health and the environment.).

<sup>354</sup>Canada provides an example. "The decentralization of environmental policy and enforcement in Canada has hampered the development of integrated policies relating to land, air, and water resources." Jeffrey C. Bates, Gregory A. Bibler, and David S. Blackmar, *Doing Business Under Canadian Environmental Law*, 11 J.Int'l.L.Bus. 1, 6 (Spring 1990)(hereinafter *Business Under Canadian Law*). Under the Canadian system, the provincial governments possess broader legislative power over environmental regulation than does the federal government. However, through its authority over areas like navigation, foreign relations, and the management of federal lands, the federal government is able indirectly to impose environmental regulation. Farah Khakee, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources*, 16 Fordham Int'l.L.J. 848, 860

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However, greater state control is a policy fraught with disadvantages if applied to federal facilities.<sup>355</sup> Environmental cleanup is a national problem requiring a “truly national response.”<sup>356</sup> Environmental cleanup at DoD facilities similarly requires a national strategy because the sites are located throughout the United States.<sup>357</sup> DoD cannot develop priorities or a national strategy if its budget and agenda are subject to control by every state in which its facilities are located.

To avoid undue control of environmental cleanup at federal facilities by states, federal control over such cleanup actions needs to be reasserted.<sup>358</sup> Since we do not want pollution to

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(1993)(hereinafter *NAFTA*). However, provincial legislation is limited in that it is preempted to the extent it conflicts with or overlaps federal legislation, and it is not applicable to federal property or instrumentalities. *Business Under Canadian Law* at 5. Some intergovernmental organizations and ad hoc groups have attempted to coordinate federal and provincial regulations, and to standardize policies for dealing with overlaps between federal and provincial regulations. For example, the Canadian Council of Ministers of the Environment (CCME), which includes federal and provincial ministers of the environment, “has no regulatory authority but holds regular meetings to formulate and standardize federal and provincial policy.” *Id.* at 6. Such organizations provide “vehicles for cooperation and communication among federal and provincial administrators...but no practicable system exists to coordinate federal or provincial environmental controls that overlap.” *Id.* One proposed solution to the overlapping jurisdiction problem involved the use of a “federal provincial regulatory board” that would issue “federal environmental approvals” to projects regulated under federal and provincial environmental assessment laws. *Id.* In using one regulatory board to issue such approvals, this proposal implicitly recognizes the need for a single federal authority to resolve problems of overlapping jurisdiction. Allowing state control at federal cleanup sites will erect an obstacle to the development of an integrated and coordinated policy for resolving such overlap problems. On the other hand, allowing DoD to act as lead agency, as this paper argues, provides the single federal authority needed to integrate and coordinate that policy.

<sup>355</sup>See Part II.B, *supra* (discussing how state involvement can hinder the cleanup process); *Letter from EPA Administrator Browner to Sen. Smith on Superfund Reform Proposal*, Daily Environment Report (BNA), 1995 DEN 133 d39 (Lexis), July 12, 1995 (Browner wrote: “I believe there is agreement that the Superfund reform should not slow the pace of cleanup. While the Administration is open to the states receiving delegation for all federal facilities, I am concerned that ongoing cleanups may be disrupted by such a delegation.”).

<sup>356</sup>Dunlap, *The Last American Warrior*, *supra* note 345, at 79.

<sup>357</sup>The 107 DoD sites currently on the NPL are located in 39 states. CBO, *CLEANING UP DEFENSE INSTALLATIONS*, *supra* note 1 at viii. A recent CBO study recommended that DoD establish priorities for cleanup, and then rank all contaminated sites in accordance with those priorities. *Id.* at x, 31-34. A recent GAO study of DoE’s environmental cleanup problems also emphasized the need for a national cleanup strategy for the agency. GENERAL ACCOUNTING OFFICE, DEPARTMENT OF ENERGY: NATIONAL PRIORITIES NEEDED FOR MEETING ENVIRONMENTAL AGREEMENTS, GAO/RCED-95-1 at 38-45 (March 1995).

<sup>358</sup>Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice*, 107 Harv. L. REV. 1328 (April, 1994) (citing THE FEDERALIST NO. 10 (James Madison)) [hereinafter Easterbrook, *Madison's Vision*].

migrate to the most favorable (i.e., lax) regulatory systems, "the level of government should be matched to the consequences of legal choices -- large enough to prevent significant effects from escaping to impose costs on outsiders, and small enough to keep rules under competitive pressure from within or without."<sup>359</sup> We see this power struggle in the recent debates over Superfund reform. On the issue of "state empowerment" under Superfund, industry groups favor state regulation (because it is easier to manipulate a state legislature). Citizens groups and environmental groups favor federal regulation (because the President, who has a national constituency, will be less likely to be swayed by parochial interests).<sup>360</sup> Pollution knows no political boundaries, therefore pollution control, like defense and antitrust policy, is a national problem requiring a national strategy.<sup>361</sup> State and local governments generally do not possess the resources or expertise to deal with the cleanup problems present at DoD facilities.<sup>362</sup> Even if the state can conduct the required cleanups at DoD facilities located within its borders, state control will preclude development and implementation of any national strategy for DoD cleanups, as discussed above.<sup>363</sup> Cleanup actions at DoD facilities should be subject to national,

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<sup>359</sup>*Id.* at 1345.

<sup>360</sup>*See, Wary of State Programs, Citizens Urge EPA Officials to Strengthen Federal Role*, Daily Environment Report (BNA), June 14, 1995, at A-9. At the June 13, 1995, public meeting to gather suggestions for legislative improvements to RCRA, community representatives urged EPA to strengthen the federal hazardous waste management program. Participants charged that state programs were not effective in enforcing individual hazardous waste treatment, storage, and disposal facilities due to lax oversight by the state, lack of public access to facility records (such as hazardous waste manifests and results of risk assessments), and "weak enforcement at certain hazardous waste combustion facilities -- especially those in interim status." *Id.*

<sup>361</sup>*See* Easterbrook, *Madison's Vision*, *supra* note 358 at 1338, 1345.

<sup>362</sup>*See* S. Rep. 848, 96th Cong., 2d Sess. 16, *supra* note 63.

<sup>363</sup>The need for a national program setting national priorities was illustrated by a recent GAO study that indicates that better prioritization of cleanup actions is needed in the Superfund program. *Superfund: GAO Report on Health Risks Posed by Sites Shows Better Priorities Needed, Bond Says*, Daily Environment Report (BNA) at A-3, August 4, 1995. In an evaluation of 225 non-federal superfund sites, GAO found that only 32 percent (71 sites) "posed (continued...)"



not state, regulation.

## V. Conclusion

Given the factors and considerations discussed above, response authority at DoD cleanup sites should be vested in a single entity -- DoD. Within the present statutory scheme, DoD should be free to exercise its presidentially delegated authority as lead agency, i.e., to act as the decision-making authority for environmental restoration at DoD facilities. This necessarily limits EPA and the states to support and consultative roles. In the context of RCRA/CERCLA integration, DoD should decide whether to proceed with cleanup under RCRA or CERCLA at sites where either statutory framework could apply.<sup>364</sup>

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<sup>363</sup>(...continued)

serious health risks under current land uses", that 53 percent (119 sites) "did not pose risks warranting cleanup under current land uses, but pose risks based on future changes in land use", and that the "remaining 35 sites did not pose health risks serious enough to warrant cleanup action under either current or future land uses." Commenting on the GAO report, Sen. Christopher S. Bond (R-Mo) said that it indicates that better prioritization is needed. *Id.* Another aspect of state control is the opportunity to "shop around" for more favorable environmental regulatory schemes. For private corporations, this obviously can influence the choice of location for a manufacturing plant or other facility. On a national scale, this can prevent effective cleanup efforts -- since polluters can move to states with less stringent regulations -- unless states can agree on uniform requirements. See Easterbrook, *Madison's Vision*, *supra* note 358 at 1338. Federal agencies may not have such freedom of movement. However, a patchwork regulatory scheme forces DoD and other large federal agencies to comply with differing requirements depending on the location of the facility. This precludes development of a national cleanup strategy by such agencies, and it adds time and expense to cleanup efforts since the federal agency must accommodate new regulators and new regulations in each state.

<sup>364</sup>Two alternative solutions also would allow development of a national strategy to combat this national problem for DoD and for all federal agencies so situated. A statutory reform approach could consolidate hazardous waste laws into one statute, eliminating the RCRA/CERCLA overlap issue, and clarify federal preemption in federal facility cleanup actions. The Canadian Environmental Protection Act, *supra* note 316, is an example of such a consolidation. A second approach would be to consolidate cleanup actions for all federal agencies under EPA. One commentator has noted that "spend[ing] billions cleaning up DoD sites simply because DoD ha[s] the budgetary means d[oes] not constitute a national policy; the effort d[oes] not weigh the relative hazards posed by various contaminated locations. Available national resources for addressing environmental concerns should [be] consolidated into the budget of the agency--presumably the [EPA]--responsible for cleaning all sites, not just DoD's. When funding is aligned with the agency that is responsible for an explicit mission, then the delineation between expenditures for the national defense and for other public purposes becomes clearer." Dunlap, *The Last American Warrior*, *supra* note 345, at 79. EPA itself employs a consolidated approach to federal facilities enforcement activities in its Federal Facilities Enforcement Office. A consolidated program can "ensure concentrated focus and expertise". Herman, *EPA Perspective*, *supra* note 10 at 1107-08. Perhaps it is more realistic to view federal agencies as a whole, rather than considering DoD or DoE  
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The present statutory framework under CERCLA for cleanup actions at DoD facilities envisions DoD control with state and local participation. Under CERCLA and DERP, DoD as the lead agency selects the statutory framework that will govern the response action. As the lead agency, DoD also selects and implements the remedial action.<sup>365</sup>

The reconciliation and integration of RCRA and CERCLA at a federal facility can be achieved with a minimum of legislative reform if three basic steps are taken.<sup>366</sup> First, we must return to the original purposes of both statutes. Thus, RCRA Corrective Action should apply only to active TSDFs<sup>367</sup> in order to prevent such facilities from becoming future Superfund sites. Under this approach, the currently over-expansive definition of SWMUs would be limited to TSDFs.<sup>368</sup> CERCLA, then, should cover all hazardous substance releases not directly caused by

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as completely separate entities. Pollution at a federal facility, whether on BLM lands, a military base, or a DoE facility, is not just the problem of that particular agency -- it is a national problem. This paper, however, advocates a strong lead agency role for DoD to ensure an environmental restoration program that best integrates the often conflicting policy objectives of national defense and environmental protection.

<sup>365</sup>To avoid unnecessary hindrances and delays to the response action, CERCLA section 113(h), 42 U.S.C. §9613(h), was enacted to limit judicial review of response actions until they are completed. See CERCLA section 113(h) discussion, *supra* page 27.

<sup>366</sup>One commentator offered the following possible solutions: one statute dealing with environmental compliance; one statute combining RCRA and CERCLA obligations; or clear direction from Congress or the Supreme Court resolving the current RCRA/CERCLA conflicts. He also proposed five possible harmonious interpretations of the present statutory framework. First, CERCLA sites should be remediated under CERCLA, with RCRA providing the ARARs. Operating units requiring RCRA permits and SWMUs would be remediated under RCRA corrective action. Second, CERCLA sites and RCRA SWMUs should be remediated under CERCLA. RCRA permits would be needed only for on-going waste management. Third, CERCLA sites and SWMUs should be remediated under CERCLA with RCRA corrective action requirements as ARARs. RCRA permits would be required for ongoing waste management. Fourth, compliance with RCRA and CERCLA is achieved through permit or agreement with appropriate authorities. Fifth, adopt the Tenth Circuit's resolution in *United States v. Colorado*, which would give state RCRA programs independent authority. Thus, remediation activities would have to comply with both CERCLA and RCRA. Stubblebine, *supra* note 91 at 106-107; see also Hourcle, *Subpart K*, *supra* note 5 at 405.

<sup>367</sup>Or TSDFs that operated after November 19, 1980, even if such facilities have subsequently been closed, as discussed *supra* at page 46.

<sup>368</sup>An even more logical approach would be to adopt the CERCLA definition of "on-site", i.e., the areal extent of the contamination, to define the "site" or "facility" or "unit" that is under remediation. EPA's over-broad regulatory (continued...)

existing TSDFs.

Second, DoD's lead agency authority must be recognized and utilized. If RCRA or CERCLA could apply at a cleanup site, then DoD, as the lead agency and after consultation with affected state and local governments,<sup>369</sup> should select the statutory framework for cleanup.<sup>370</sup> As argued above in Part III, CERCLA already allows for state participation in the cleanup

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<sup>368</sup>(...continued)

definition of SWMU has long raised concerns among the regulated community that the RCRA corrective action program would expand its scope beyond releases from waste management facilities. One commentator noted that "[e]very trash dumpster at an industrial plant became an SWMU." Richard A. Flye, *RCRA Corrective Action Regulations -- Mistakes of the Past Should Not Be Repeated*, 16 Chemical Waste Litigation Reporter 188, 189 (1988). Most RCRA/CERCLA overlap problems should be eliminated by confining RCRA corrective action to releases of hazardous waste or hazardous constituents from *waste management* facilities, i.e., TSDFs, and allowing CERCLA to cover all other hazardous substance releases.

<sup>369</sup>This paper argues that state and local governments should not *control* the remediation process at DoD-owned sites. However, that does not mean that state and local governments should be afforded no opportunity to participate in the process. State and local concerns can be allayed (and perhaps litigation and delay avoided) through the use of strategies like Site Specific Advisory Boards (SSABs), proposed by the EPA-chartered Federal Facilities Environmental Restoration Dialogue Committee in an April 1993 report. Herman, *supra* note 10 at 1106-07.

<sup>370</sup>The need for lead agency authority to select the statutory framework for a cleanup action was highlighted in recent testimony concerning cleanup actions at closing military bases by Sherri W. Goodman, deputy under secretary of defense for environmental security, before the House Appropriations Subcommittee on Military Construction. Ms. Goodman requested more facility oversight under RCRA "rather than superfund, because 'you can conduct a responsible oversight at a lower cost under RCRA.'" *Federal Facilities: DoD Official Tells House Panel That Cuts Would Slow Base Reuse Cleanup*, Daily Environment Report (BNA), 1995 DEN 60 d6, March 29, 1995. This is exactly the type of policy decision that should be made by a federal agency as it seeks to balance its statutory responsibilities. *Apache Powder Co. v. U.S.*, 968 F.2d at 69. Ms. Goodman also requested Superfund reforms, such as consideration of future use in setting cleanup standards, that would allow DoD more flexibility in handling cleanup actions at closing bases. Such reforms are being considered by the federal government. *See, e.g., Federal Facilities: Interagency Dialogue Committee Aims for Accord on Risk Assessment, Land Use*, Daily Environment Report (BNA), August 2, 1995, at A-6. Allowing lead agencies the flexibility to set an *appropriate*, rather than the most stringent, standard will benefit federal agencies like DoD in terms of reducing cleanup costs. CBO, *CLEANING UP DEFENSE INSTALLATIONS*, *supra* note 1 at 23-25. Such flexibility will also benefit states and localities anxious to reuse closed military bases. *Id.*; *see also, Superfund: Congressional Coalition Seeks Input on Federal Action to Aid Redevelopment*, Daily Environment Report (BNA), July 11, 1995, at A-2 (The "brownfields" concept seeks to encourage the redevelopment of abandoned contaminated property. Proponents argue that by allowing flexibility in cleanup and liability standards, such redevelopment "has the potential to increase employment, add tax revenues, and return economic vitality back to communities at the same time environmental concerns are being addressed."); Wegman, *Cleaning Up Military Waste*, *supra* note 7 at 943 (arguing that Congress should help DoD balance the often competing goals of cleanup and reuse by setting national goals, but allowing DoD greater latitude in fashioning local remedies.). For remediation efforts on bases due to be closed, states should be afforded enhanced participation in the process. The potential for reuse should provide adequate incentive to expedite the remediation process and to employ reasonable cleanup standards (i.e., standards based on risk assessment and future use). Accompanying this increased participation should be the obligation to contribute more to the funding of the cleanup action.

process. However, allowing state control over the process, as the Tenth Circuit did in *United States v. Colorado*, allows states to upset the balance struck by the federal government between two important federal interests: the national defense and environmental protection. To borrow from Justice Powell's argument in *California Coastal Comm'n. v. Granite Rock Co.*<sup>371</sup>, duplicative and overlapping state authority at DoD cleanup sites is contrary to the comprehensive environmental restoration program enacted by CERCLA and contrary to common sense.

Third, EPA's proposed parity guidance should be applied. Again, this only emphasizes the obvious point that the objective of any cleanup action must be cleanup in accordance with applicable standards. It should be noted that if a federal agency decides to proceed under CERCLA, RCRA is not necessarily irrelevant to the cleanup action. RCRA requirements are often used as ARARs in CERCLA cleanup actions.<sup>372</sup>

Legislative reform could be helpful in clarifying federal and state authority at CERCLA sites. For instance the requirement under CERCLA section 121 that any remedial action comply with all ARARs of federal or state law should be eliminated. That provision, explained one commentator, is part of the 1986 CERCLA amendments that were a reaction by Congress against perceived lax enforcement by the EPA under Anne Gorsuch Burford. The provision "has proven to be costly and contentious to administer as the potentially responsible parties and federal and state agencies and local citizens groups argue endlessly over what regulations are applicable, relevant, or appropriate and where and when exactly they are to be applied."<sup>373</sup> CERCLA should be flexible enough to allow the lead agency to tailor the cleanup standards to

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<sup>371</sup>480 U.S. at 604-606, *supra* note 18.

<sup>372</sup>CERCLA section 121(d), 42 U.S.C. §9621(d).

<sup>373</sup>Hall, *Superfund Reauthorization*, *supra* note 351, at 236.

site-specific conditions, such as reasonably anticipated future use.<sup>374</sup>

This demarcation of authority, plus recognition of DoD's lead agency authority at DoD cleanup sites and recognition of the parity between RCRA and CERCLA, are all consistent with the original CERCLA objective of providing the *federal* government with the "tools necessary for prompt and effective response to problems of national magnitude resulting from hazardous waste disposal."<sup>375</sup> These steps are also consistent with the RCRA policy of avoiding duplication with other environmental regulations.<sup>376</sup> Finally, by allowing DoD to exercise its lead agency authority in conducting cleanup actions, these steps enhance DoD's ability to balance the often conflicting policy objectives of environmental restoration and national defense.

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<sup>374</sup>*Id.* Mr. Hall suggests the replacement of the current ARARs language with requirement that remedial action "leave a site in compliance with legally applicable requirements -- period. In other words, the site should not be causing or substantially contributing to violations of drinking water standards, water quality standards, air quality standards, or hazardous waste disposal standards." *Id.*

<sup>375</sup>*United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1418 (6th Cir.1991)(quoting *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1112 (D.Minn.1982)). Under CERCLA, an effective response is one that is "thorough yet cost-effective". *Akzo Coatings of America, Inc.*, 949 F.2d at 1418 (citing CERCLA sections 121(a) and 121(b), 42 U.S.C. §§9621(a), 9621(b)).

<sup>376</sup>RCRA section 1006(b)(1), 42 U.S.C. §6905(b)(1).